89-588 (1)

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDNA EMERSON LITTLEWOLF, et al.,

Petitioners,

—v.—

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL D. RATNER*
MAHLON F. PERKINS, JR.
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6447

ALAN J. WEINSCHEL
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153

**Counsel of Record for Petitioners*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Edna Emerson Littlewolf and twenty other members of the White Earth Band of the Minnesota Chippewa Tribe whose names are listed under PARTIES TO THE PROCEEDINGS, together with Anishinabe Akeeng, an Indian organization, petition on their own behalf and on behalf of a class consisting of all Indians whose claims have been adversely affected by the White Earth Reservation Land Settlement Act, for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 30, 1989.

QUESTIONS PRESENTED

1) Whether an Act of Congress violates the Just Compensation Clause of the Fifth Amendment to the United States

Constitution when it bases compensation for taking the petitioners' property not on the value of their property at the date of taking but on its conjectured value at dates in the remote past, resulting in compensation substantially below the value of the property taken.

2) Whether a patently unconstitutional legislative scheme for determining the compensation to be paid to thousands of individual Indians for taking their property can be saved by affording them a severely circumscribed right to challenge the statutory amount in a Tucker Act suit.

PARTIES TO THE PROCEEDINGS

Petitioner Edna Emerson Littlewolf, an appellee in the Court of Appeals and a plaintiff in this action, is a member of the White Earth Band of Indians to whom

the White Earth Reservation in Minnesota was secured by treaty in 1871. The twenty other individual petitioners are also members of the White Earth Band. They are Lowell Laverne Bellanger, William R. Bellanger, Paul L. Bellcourt as the duly appointed legal guardian of Joseph Bellcourt, Richard Bellcourt, Augustus Brown, John Brown, Everett William Goodwin, John Guinn, Gordon Donald Henry, Charlotte Elizbeth Jackson, George Edward Jackson, Winnie Jourdain, Harry Joseph Kettle, Seraphine Martin, Tom Neeland, Pete Sailor, Wallace M. Sargent, Cheryle Leecy Slayton, Ethelbert Van Wert, Ethel Bement Williamson. The petitioner Anishinabe Akeeng (The People's Land) is an organization whose members are White Earth Indians and whose purpose is the return of lands within the

White Earth Reservation to Indian ownership.

The individual petitioners represent a class consisting of all Indians whose claims to land on the White Earth Reservation have been adversely affected by the White Earth Reservation Land Settlement Act and petition on behalf of the class as well as on their own behalf.

The appellees and defendants below were Donald Paul Hodel, Secretary of the Interior; Ross O. Swimmer, Assistant Secretary of the Interior - Indian Affairs; and Edwin Meese, III, Attorney-General. These appellees have been succeeded in office, respectively, by Manuel Lujan, Jr., Edward Brown, and Richard L. Thornburgh; and they constitute the present parties respondent. The State of Minnesota and

the Counties of Becker, Clearwater, and Mahnomen were permitted to intervene a defendants and were also appellees in the court of appeals.

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit issued a decision on June 30, 1989 affirming a judgment of the United States District

Court for the District of Columbia which denied plaintifs' motions for a preliminary injunction and for summary judgment, and granted cross-motions for summary judgment by defendants and defendant-intervenors.[1] A copy of its opinion, reported at 877 F.2d 1058 (D.C.Cir. 1989) is annexed as Appendix A.[2] A copy of the opinion of the District Court, reported at 681 F. Supp. 929 (D.D.C 1988), is annexed as Appendix B.

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[1] The District Court also granted plaintiffs' motion to certify a class consisting of all Indians whose claims to land on the White Earth Reservation have been adversely affected by the White Earth Reservation Land Settlement Act. The order certifying the class was not appealed.

[2] The opinion was rendered by only two members of the panel who heard oral argument. Judge Starr, having been appointed United States Solicitor-General, recused himself and took no part in the decision.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. § 1331, and that of the court of appeals on 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of lie or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

White Earth Reservation Land Settlement Act, 25 U.S.C. § 331 (note). The text of the relevant sections is reproduced in Appendix C.

Tucker Act, 28 U.S.C. § 1491, in relevant portion:

> The Court of Claims [now the Claims Court pursuant to 28 U.S.C. §§ 171(A), 172(A)] shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States in cases not sounding in tort.

STATEMENT OF THE CASE

Nature of the Action

This case is an effort to prevent the federal government from crowning eighty years of wrongful treatment of the members of the White Earth Band of the Minnesota Chippewa Tribe by extinguishing forever the very claims to which its own unlawful actions gave rise. The individual plaintiffs are members of the White Earth Band who, like thousands of other members of the Band, have claims to recover allotments of land within the White Earth Reservation in Minnesota -- land which was lost as the direct result of an unconstitutional statute, the Clapp Amendment of 1906, and the government's subsequent neglect of its fiduciary obligations as the Indians' trustee. They sue the Secretary of the Interior ("Secretary") and other officers of the

federal government on behalf of all other members of the Band with claims affected by the White Earth Reservation Land Settlement Act ("White Earth Act" or "Act"), 25 U.S.C. § 331 (note).

There is no dispute as to the controlling facts. It is undisputed that both federal and state courts have held that the Clapp Amendment unconstitutionally deprived the White Earth Indians of vested rights in their allotments, or that, as a consequence, thousands of Indians were dispossessed of allotments or interests in allotments as to which it has been determined that they are entitled to recover title and damages. The only issue is whether Congress, in attempting through the White Earth Act to dispose once and for all of the problems stemming from the Clapp Amendment, has once again acted in

disregard of the Constitution.

The White Earth Act purports to "settle" the problems occasioned by the illegal transfer of White Earth allotments to the State of Minnesota, to the three Minnesota counties in which the Reservation is situated, and to numerous private landholders. But although denominated a "settlement act," it is not a settlement in any recognized sense of the term, for (unlike the true Indian settlement acts) it does not settle ongoing litigation and, far from being agreed to by the Indian claimants, was bitterly opposed by the White Earth Band. It is, on the contrary, a "solution" imposed by Congress on the Indians to their detriment for the exclusive benefit of the Minnesota political entities and private persons who supported it. The scheme of the Act is beautiful in its

simplicity but ugly in its grossly unequal treatment of the Indians: it (1) extinguishes forever the White Earth Indians' claims to title and damages for the loss of their ancestral lands, paying them a pittance in compensation, and (2) bestows unclouded title on all present occupants of the Indians' land without exacting a penny for such largesse.

Origin of the White Earth Claims[3]

The White Earth claims derive from the unlawful provisions of the infamous Clapp Amendment of 1906, 34. Stat. 353, which sought to renege on the solemn promises made to the White Earth Indians when they agreed to the partition of their reservation lands into allotments. The

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[3] A somewhat fuller account of this important history may be found in the opinion of the Court of Appeals, App. A at A 3 - A 6. The district court's opinion takes scant notice of the history.

White Earth Reservation, containing about 830,000 acres to be held "in perpetuity" by the White Earth Band, had been established under the Treaty of March 19, 1867, 16 Stat. 719. Twenty years later the General Allotment Act of 1887, 24 Stat. 389, created a nationwide allotment system for the conversion of tribal lands to individual ownership. Under the Nelson Act of 1889, 25 Stat. 642, every member of the White Earth Band born before 1901 was allotted 80 acres of land.[4] The allotments were to be held in trust by the United States for the benefit of the allottees and their heirs for a minimum of 25 years.[5] This trust included

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[4] Later increased to 160 acres. More than 12,000 allotments, comprising nearly 675,000 acres, were issued to White Earth Indians under these Acts.

[5] The trust periods were extended for limited periods by successive Executive Orders. In 1934 they were

several key provisions to protect Indian ownership of the allotments: (1) the allotments could not be sold or encumbered without federal approval; (2) they were exempt from taxation for the duration of the trust; (3) under the Act of June 25, 1910, 36 Stat. 855, the Secretary of the Interior was required to determine the heirs of allottees who died before the expiration of the trust period.

The Clapp Amendment, enacted in response to pressure from Minnesota lumber companies and other interest hungry for Indian land, purported to remove all restrictions on the sale, encumbrance, or taxation of allotments within the White Earth Reservation held by adult "mixed-blood" Indians (a term

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extended indefinitely by the Indian Reorganization Act, 25 U.S.C. § 462.

construed to comprehend every Chippewa Indian having an "identifiable mixture of other than Indian blood, however small.") The consequences were devastating. The State and its Counties began to assess taxes on allotments, resulting in the loss of many allotments through tax forfeitures. Substantial lands were also lost through a variety of fraudulent or unconscionable transfers. Within three years a federal investigation disclosed that fully 80 percent of lands on the reservation had passed to private ownership.

This tragedy was compounded by the abandonment by the Secretary of the Department of the Interior ("DOI") of one of his chief duties as the Indians' trustee. In 1915, the Solicitor of the DOI construed the Clapp Amendment to deprive the Secretary of jurisdiction to

determine the heirs of adult mixed-blood allottees, and the Secretary ceasing probating those estates. As a result, many estates were improperly probated by state courts, or not probated at all. It thus became impossible for the heirs of many allottees to establish their rights to allotments lost in the wake of the Clapp Amendment.

Invalidity of the Clapp Amendment

In 1917, the Eighth Circuit ruled that White Earth allottees had a vested property right in the tax exemption created by the trust, and that the Clapp Amendment could not terminate that status without compensation or consent. Morrow v. United States, 243 F.2d 854 (8th Cir. 1917). Thus, taxes imposed on allotments held by mixed-bloods were for the most part illegal, as were forfeitures for non- payment of such taxes. Yet

forfeitures continued to be imposed by the State and its counties.[6] Moreover, many allotments passed out of Indian hands by reason of other types of transfers that were incompatible with a trust status. These included sales of land made by female mixed-bloods under the age of 21 without the Secretary's consent, and transfers made under the authority of invalid state probates.

In 1977, the Minnesota Supreme Court reaffirmed the continuing validity of the trust obligations imposed by the General Allotment Act and the Nelson Act, holding that the trust status of White

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[6] Especially after the lapse of 25 years from the date of issuance of an allotment, ignoring the executive orders and legislation which have kept the trust in force for most allotments. Over and above tax-forfeited land sold to private owners, Minnesota and the three defendant counties still hold at least 169,000 acres.

Earth allotments had not been terminated by the Clapp Amendment. State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978). The court ruled that the heir of an allottee whose land had been tax-forfeited retained an equitable title which he could enforce against third parties who had purchased the land from the State.

Following Zay Zah, the DOI Solicitor issued an opinion finding that the trust relationship between the United States and the Indians was a vested right which could not be altered by Congress, that the 1915 opinion depriving the Secretary of jurisdiction to determine the heirs of mixed-blood White Earth Indians was erroneous, and that the Secretary had remained obligated to make those determinations and probate the estates of all deceased White Earth allottees. The

Bureau of Indian Affairs ("BIA") thereupon took widely publicized but incomplete and ineffective steps to recover land and damages on behalf of the White Earth Indians.[7] The consequent cloud on title to more than 100,000 acres of State, county and private land prompted the outcry that led to the passage of the White Earth Act.

The White Earth Act

The general scheme of the Act is to clear title to land as to which White Earth allottees and their heirs may have valid claims by extinguishing those claims in return for compensation based

[7] The BIA sent at least 750 letters to the State, the counties and private landholders advising them of its intention to bring suit to quiet title for the benefit of the rightful Indian owners. The DOI also requested the Department of Justice ("DOJ") to sue to quiet title and recover damages relating to numerous lost allotments, but not a single law suit was instituted.

on the value of the land at the time it was lost.[8] Section 6(c) extinguishes the claims of White Earth Indians to recover allotments or interest covered by the Act, or damages resulting from their loss, unless such claims are filed within the later of 180 days of the Act's enactment, or certification by the Secretary that the conditions set forth in Section 10 have been met.

Importantly, the filing of any such action bars the allottee or heir from receiving the statutory compensation to which he or she would otherwise be entitled. This compensation is fixed in Section 8(a) as the fair market value of the land at the time of its tax forfeiture, sale, mortgage or other

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[8] For the text of the sections of the Act which are referred to, see Appendix C, A 47 - A 54.

transfer, less any compensation received (with certain exceptions), plus interest compounded annually at 5% to the date of enactment and thereafter at the general rate of interest earned by DOI funds. A claimant may challenge the constitutional adequacy of such compensation as applied to a particular allotment or interest by filing a Tucker Act suit, but at the cost of losing his or her right to statutory compensation. Act § 6(d).[9]

Proceedings Below

The complaint, filed on March 24, 1987, states claims based both on the violation of the petitioners' constitutional rights and on the failure of the federal government to carry out

[9] The Tucker Act suit must be filed within 180 days after the issuance of the notice of the Secretary's determination. Act § 6(d).

its trust responsibilities to the White Earth Indians. It sought a judgment declaring that the White Earth Act takes the Indians' property without just compensation and deprives them of due process in violation of the Fifth Amendment.[10] The State of Minnesota and the Counties of Becker, Clearwater, and Mahnomen were permitted to intervene as parties defendant. Petitioners moved to certify a class consisting of all Indians whose claims had been adversely affected by the White Earth Act. They also moved for a preliminary injunction restraining the Secretary from publishing the certification pursuant to Section 10 of

[10] The complaint also sought a judgment declaring that the federal government had violated its duties as a trustee for the White Earth Indians and granting injunctive relief. Petitioners did not appeal the denial of this relief by the district court.

the Act that would have extinguished the White Earth claims. All parties filed motions or cross-motions for summary judgment. The district court ordered a combined hearing on all motions.

In its decision of March 17, 1988 the district courted granted petitioners' class action motion, denied their motions for a preliminary injunction and summary judgment, and granted summary judgment in favor of defendants. Petitioners appealed the dismissal of their claims seeking a declaration that the White Earth Act is unconstitutional. On June 30, 1989 the court of appeals affirmed the judgment of the district court.

The District Court Opinion

The district court rejected petitioners' due process challenge to the Act on the ground that the 180-day limitations period was manifestly

insufficient to allow the White Earth Indians a reasonable opportunity to bring suit before the final extinction of their claims. App. B at A 25 - A 35. In doing so, the court dismissed as irrelevant the many factors which would prevent all but a few from asserting their claims: the complexity of the litigation; their poverty and lack of education; their ignorance of their claims because of the federal government's failure to perform its obligation to determine heirship; their misplaced reliance on the government's fiduciary duty to enforce the damage and title claims of its Indian beneficiaries; and the forfeiture of statutory compensation by a claimant electing to sue. Id. at A 29 - A 31. Accordingly, the court held that there was no taking which conferred a right to Fifth Amendment compensation. Id. at

A 36. . It further held that, even if the extinction of petitioners' claims amounted to a taking, the compensation provided by the Act was constitutionally adequate and that, if there was any inadequacy, it could be remedied through the availability of suit in the United States Claims Court pursuant to the Tucker Act. Id. at A 37 - A 44.

The Court of Appeals Opinion

The court of appeals did not decide petitioners' due process claims but upheld the validity of the Act on the ground that it afforded them just compensation, stating:

> We find it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act. Even if we assume arguendo that the six-month limitations period is unreasonably short and that, as a consequence, the Act effectively "takes" the Band members' property rights, we conclude that the statute provides the Indians with just

> compensation, for the reasons discussed below.

App. A at A 11 - A 12. Those "reasons," insofar as they are discernible, appear to be (1) the conclusion, stated without discussion, that the "basic compensation mechanism will yield a fair payment in most cases and therefore does not, on its face, violate the Just Compensation clause," and (2) its further conclusion that the "Tucker Act 'safety net' ensures full compensation in those particular instances where the statutory payment might not adequately compensate claimants." Id. at A 13. Respecting the adequacy of the "safety net," it concluded that the six-month period allowed by the Act for suing in the Claims Court following notice of the Secretary's determination of compensation provides " as meaningful Due Process

protection" as the normal six-year period for bringing a Tucker Act suit. Ibid. Since the "precise date of the taking for valuation purposes" could be determined in a Tucker Act suit, the court found it unnecessary to reach the (crucial) issue of whether the taking occurred on March 21, 1988, - the date when the White Earth claims were extinguished under the provisions of the White Earth Act - or forty or fifty or more years ago, when the illegal land transfers took place that gave rise to the claims. Id. at A 14. It was sufficient for the court of appeals to signify its agreement with "the district court's conclusion that the Act's payment provisions represent 'a good faith effort to compensate plaintiffs fairly' under the Just Compensation clause." Id. at A 13.

REASONS FOR GRANTING THE WRIT

Practically without discussion and plainly without analysis, the court of appeals has confounded the constitutional law of just compensation,[11] which in recent years has received the most careful consideration of this court. E.g., Hodel v. Irving, 481 U.S. 704 (1987). First, of all, it treats the date of taking by the United States, which absolutely governs the valuation of the property taken, as of little consequence in passing upon the validity of a statutory compensation scheme. Secondly, it mistakenly elevates the presumed[12] availability of Tucker Act

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[11] This petition concerns only issues of just compensation, which were the only issues on appeal decided by the court of appeals.

[12] "Presumed" in this case because the discriminatory and burdensome restrictions placed by the Act on resort

suits into a cure-all for any and all legislative takings, no matter how prima facie defective in providing for just compensation. Petitioners submit that this erroneously extends the holdings of the Regional Rail Reorganization Cases, 419 U.S. 102 (1974), and Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), to situations completely outside the limited parameters of these decisions. If permitted to stand, this precedent would be used to sanction future legislative disregard of Fifth Amendment compensation standards.

The Standard for Just Compensation

The constitutional standard for just compensation is well settled: it is the value of the property at the time it is

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to the Claims Court by dissatisfied White Earth Indians rules out the availability of this remedy for most members of the Band.

taken. In United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938), this Court held that:

> The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. [Citation omitted.]

304 U.S. at 123-124. See Fort Berthold Reservation v. United States, 390 F.2d 686, 690 (Ct.Cl. 1968) ("'just compensation' has been uniformly held to mean value at the time of taking"). In Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984), this Court held that a condemnation award must be modified where the value of the appropriated land changes materially between the valuation date and the date of taking. Generally, this means the

fair market value of the property at the date it is appropriated. Id. at 10 and cases cited.

Under the White Earth Act the taking occurs when the claims are extinguished. That date is the date of certification by the Secretary, which was March 21, 1988. Yet the Act bases compensation for the loss of an allotment or interest on "the fair market value of the land or interest therein as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer described in section 4(a), 4(b), or 5(c), . . ." Act, § 8(a). Thus the statutory scheme prima facie violates the constitutional standard as to the date of valuation.

There is evidence that the claims as a whole are valued for purposes of the Act at an implausibly low fraction of the land in dispute. The Congressional

Budget Office's estimate of the cost of paying claims under the Act is only $12 million for the 100,000 acres subject to claims, or approximately $120 per acre. Yet Minnesota valued the 10,000 acres to be transferred to the tribe at $6 million, or $600 per acre. Thus the White Earth claims are being paid off at only one-fifth of the average value of the land.

Moreover, although the Act bars all actions to recover title, (§ 6(c)), it provides no compensation whatsoever for loss of use of the land that was illegally transferred out of Indian ownership. This includes the loss of rents, mineral royalties, timber rights and other profits. The just compensation to which petitioners are entitled for decades of wrongful deprivation of their land and, in some cases, for its

depletion or spoliation, is plainly not insubstantial.[13] Yet the court's opinion makes no reference to the Act's omission of this element of just compensation.

Without reference to the constitutional standard or the cases that establish it, the court below merely asserts, without legal or factual support, that the Act's "basic compensation mechanism will yield a fair payment in most cases and therefore does not, on its face, violate the Just Compensation clause." App. A at A 13. It cites United States v. Creek Nation, 295 U.S. 103 (1935), reh. denied, 295 U.S. 769 (1935), but merely for the unexceptionable proposition that "just compensation requires payment of amount

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[13] Damage claims as high as $16,000 and $23,000 were specified in some of the litigation requests submitted by the BIA to the Department of Justice.

equivalent to fair market value of land plus reasonable interest." Ibid. True, but fair market value when? From the following page of the court's opinion it appears that it chose not to address this question; instead, it left the task to the Claims Court, assuming that some dissatisfied White Earth claimant could ever manage to make it to that court. Id. at A 14. But it was the court's duty to address this question, which is crucial for determining whether the Act's "basic compensation mechanism" would indeed yield a fair payment in all cases (not most cases) and therefore not, on its face, violate the Just Compensation clause (as it does).

The court of appeals does refer obliquely to the district court's theory that the taking may be viewed as having occurred on the date an allotment was

improperly alienated and the "government/trustee" failed to intervene. App. A at A 14; App. B. at A 37. Again, the court abstains from expressing any opinion on this far-fetched speculation. One wonders why, for it is so devoid of merit that comment could have been quick and painless. The losses of White Earth allotments as a result of tax forfeitures and other illegal transfers in the distant past did not occur as the result of an act or acts of expropriation by the federal government, even though it was the government's derelictions that made it possible for others to perpetrate such illegal transactions. The allotments passed to the State of Minnesota, its counties, and private owners. No Fifth Amendment taking occurred on those dates. The petitioners' vested property rights in their accrued causes of action arising

out of such illegal transfers remained viable ever since until quenched for all time on March 21, 1988, unless this Court should hold the Act unconstitutional.

The Tucker Act as a "Safety Net"

The court of appeals appears to assume that the availability of "an ordinary Tucker Act procedure" (i.e., one not hedged in with the restrictions imposed by the White Earth Act) is sufficient to remedy defects in a statutory compensation scheme that is basically valid. Relying without analysis of its own on the district court's opinion, it states that, in such case:

> . . . there would be little dispute about WELSA'S validity under the Fifth Amendment: a Tucker Act "safety net" suffices when "a statute's basic compensation scheme . . . is valid but could result in payment of less than the constitutional minimum." Littlewolf, 681 F.Supp. at 946 (quoting Regional Rail Reorganization Act Cases, 419 U.S 102, 150 (1974).

App. A at A 12. Accordingly, it devotes the remainder of its consideration of the Tucker Act "safety-net" solely to the question whether the six-month limitations period prescribed by the White Earth Act (in contrast to the six-year period available under the "ordinary" Tucker Act procedures) and the other formidable burdens placed on suit by the White Earth Indians in the Claims Court unconstitutionally diminished the otherwise assumed safety of the net.

But petitioners do dispute the assumption that the availability of even the "ordinary" Tucker Act procedures can rectify the facially unconstitutional compensation scheme of the White Earth Act. Neither the Rail Reorganization case, not discussed by the court of appeals, nor Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), not even mentioned

by the court of appeals, may be read to sanction such an erosion of Fifth Amendment principles.

Neither Monsanto nor the Rail Cases dealt with a "taking" statute like the White Earth Act. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") upheld in Monsanto instituted a comprehensive regulation of pesticides under the aegis of the EPA. FIFRA did not purport to take private property. The fact that certain provisions relating to the disclosure of pesticide data might work a Fifth Amendment taking of trade secrets was an incidental and contingent effect of the legislative program which there was no evidence that Congress had contemplated. Thus there was no occasion, and probably no practicable way, of legislating a specific formula for compensating such

unpredictable consequences of regulation. Reliance on the Tucker Act's "general grant of jurisdiction" made good sense.

The Rail Cases examined a complex statute (the "Rail Act") providing for the reorganization of the Penn Central and other insolvent East Coast railroads into Conrail. At issue were two prospective types of potential takings: (1) "erosion takings," which might have resulted from interim losses as a result of compelled continuance of railroad operations beyond a reasonable period of time and (2) "conveyance takings," which might have occurred if the consideration authorized by the Rail Act in exchange for the rail properties should prove to be less than the constitutional minimum. Whether such takings would occur was still hypothetical at the date of the this Court's decision, and there was no

evidence that Congress intended less than full compensation for any takings that might occur.

The White Earth Act, by contrast, "takes" the claims of thousands of individual heirs.[14] Indeed, its central purpose is to do so; it is a "taking" statute. The formula Congress legislated for compensation of the thousands of heirs is an obviously defective one that patently violates constitutional standards. Moreover, Congress had no expectation that it was providing "the minimum compensation required by the Constitution."[15] Monsanto and the Rail

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[14] The BIA estimates that 8,500 present day heirs are entitled to compensation.

[15] Congress had been advised by Assistant Attorney General McConnell that the owners of the White Earth claims were entitled to compensation at the time the proposed legislation "takes" them. Rather than cure this defect, Congress

Cases are not precedents for holding that such a taking statute can be saved by reading in an escape via the Tucker Act.

To sanction such a scheme here would mean that Congress could systematically legislate unconstitutional formulas for just compensation relying on the Tucker Act to save the statute. If it could constitutionally do so, this would effectively shift the burden in all cases to property owners whose property it confiscates and result in the majority of such persons receiving unconstitutional compensation. Monsanto and the Rail Cases do not support such an absurd and unjust result.

The Restrictions on the "Safety Net"

In Monsanto and the Rail Cases this Court found no Congressional intent to

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simply added a severely limited Tucker Act remedy to the statute.

exclude any person whose property might be taken through operation of the regulatory scheme from recourse to "the general grant of jurisdiction" under the Tucker Act. Unlike the statutes upheld in those cases, the White Earth Act specifically denies recourse to the Tucker Act as written and construed. A White Earth claimant who is dissatisfied with his statutory compensation must: (1) file his complaint within 180 days after notice of the determination; (2) forfeit his award; and (3) limit his claim to "the constitutional adequacy of the compensation provisions of § 8(a) as they apply to a particular allotment or interest . . . ." Act § 6(d) (emphasis added). These conditions impinge impermissibly on "the general grant of jurisdiction" under the Tucker Act. To validate them here would be to sanction

almost any kind of restriction Congress might in the future choose to lay upon the vindication of constitutional rights in the federal courts.

The 180-day limitation period is one-twelfth of the six-year period to which all other Tucker Act plaintiffs are entitled. The forfeiture provision places an unconstitutional burden on the exercise of a constitutional right. And the limitation on the scope of the Claims Court's review may preclude a class action challenge to the compensation scheme, permitting only piecemeal challenges burdensome to both potential plaintiffs and the judicial system.[16]

These substantive and procedural

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[16] Cf. Quinault Allottee Ass'n v. United States, 453 F.2d 1272 (Ct. Cl. 1972), cert. denied, 416 U.S. 961 (1974) (class action available under Tucker Act).

limitations on the right of White Earth Indian claimants to resort to the "general grant of jurisdiction" under the Tucker Act place such claimants at a severe disadvantage vis-a-vis all other litigants having Tucker Act claims for just compensation. There is no discernible legislative purpose for imposing these discriminatory burdens other than that of keeping any Tucker Act complaints to a trickle and avoiding the payment of just compensation -- a purpose they masterfully accomplish.[17]

Monsanto and the Rail Cases support, if at all, only a resort to the "general grant of jurisdiction" under the Tucker

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[17] This unjustifiable burden imposed on White Earth claimants and on no other class of litigants under the Tucker ACt would violate the Equal Protection clause if the Tucker Act provisions of the White Earth Act were to be given effect. See, e.g., Lindsey v. Normet, 405 U.S. 56, 74-79 (1972).

Act, not the grudging and mangled recourse allowed by the White Earth Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael D. Ratner*
Mahlon F. Perkins, Jr.
Center for Constitutional Rights
666 Broadway
New York NY 10012
(212) 614-6447

Alan J. Weinschel
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

Attorneys for Petitioners

New York, N.Y.
September 28, 1989

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* Counsel of Record for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 23, 1989 Decided June 30, 1989

No. 88-5172

EDNA EMERSON LITTLEWOLF, *et al.*, APPELLANTS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(D.C. CIVIL ACTION NO. 87-00822)

Michael D. Ratner, with whom *R. Bruce Rich* and *Gloria C. Phares* were on the brief, for appellants.

Edward J. Passarelli, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Assistant Attorney General, and *Robert L. Klarquist*, Attorney, Department of Justice, were on the brief, for federal appellees.

Bruce J. Terris and *Kathryn A. Bleeker* were on the brief for appellees Becker, Clearwater, and Mahnomen Counties.

James M. Schoessler, Assistant Attorney General for the State of Minnesota, and *William A. Szotkowski* were on the brief for appellee State of Minnesota.

William T. Finley, Jr. and *David F. B. Smith* were on the brief for *amicus curiae* American Land Title Ass'n in support of appellees, *urging affirmance*.

Before ROBINSON, STARR,* and BUCKLEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge:* Appellants, members of the White Earth Band of the Chippewa Tribe, seek review of the district court's decision upholding the constitutionality of the White Earth Reservation Land Settlement Act of 1985. The Act extinguishes the Indians' claims to land illegally transferred earlier in this century, in return for payment of compensation based on the fair market value at the time of transfer plus five percent interest. The Act gives claimants the option of filing an action for judicially determined compensation within six months of the issuance of notice of the payment due them, in which case they forego their statutory compensation.

Appellants argue that the White Earth Reservation Land Settlement Act violates the Fifth Amendment in two ways. First, they assert that the six-month limitations period is unreasonable under the Due Process clause because the federal government has breached its trust duty to provide the Indians with information sufficient to enable them to bring timely claims. Second, the Chippewas contend that the Act effects a taking of their property without just compensation.

We find it unnecessary to resolve the Due Process issues because even if we assume that the period allowed for filing claims is unreasonably short and "takes" the White Earth Indians' property rights, we conclude that the Act's compensation provision (land value plus interest) is reasonable; furthermore, the Act permits a Band member to challenge the adequacy of the statutory compensation in a Tucker Act suit.

As the Act does not contravene the Fifth Amendment, we affirm the district court's judgment.

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* Judge Starr recused himself from further consideration of this case after oral argument and took no part in this decision.

I. BACKGROUND

A. Historical Framework

Through a series of treaties, the Chippewa Indian Tribe ceded substantial territory in Minnesota to the United States in return for payments and the creation of the 830,000-acre White Earth Reservation. *See, e.g.*, Treaty with the Chippewa Indians, March 19, 1867, 16 Stat. 719. With the General Allotment Act of 1887, 24 Stat. 388, as applied to White Earth through the Nelson Act of 1889, 25 Stat. 642, Congress began a policy of breaking up tribal reservations and granting parcels (usually eighty acres) to individual Indians through "trust patents," which provided that the United States would hold each allotment in trust for twenty-five years and then convey title in fee to the allottee. During this period, the property would be tax-exempt and could not be conveyed or encumbered without the approval of the Secretary of the Interior ("Secretary").

Pursuant to the Nelson Act, about 5,000 trust patents were issued, most of them in 1902. The Steenerson Act of 1904, 33 Stat. 539, authorized the President to make additional allotments, so that each Chippewa legally residing on White Earth would receive 160 acres. *See generally* Peterson, *That So-Called Warranty Deed: Clouded Land Titles on the White Earth Indian Reservation in Minnesota*, 59 N. Dak. L. Rev. 159, 164 (1983) (sources cited).

Congress purported to abolish the trust relationship established by the General Allotment Act when it adopted the Clapp Amendment of 1906, 34 Stat. 325, 353, as amended by the Act of March 1, 1907, 34 Stat. 1015, 1034. That statute removed "all restrictions as to the sale, incumbrance [sic], or taxation for allotments within the White Earth Reservation . . . held by *adult mixed-blood Indians*" and also authorized the Secretary of the Interior to grant fee simple title to *adult full-blood* applicants deemed "competent to handle their own affairs." *Id.* (emphasis added). The Amendment resulted in the swift transfer to private parties of the vast majority of reservation land from Indians who had been granted fee simple ownership. *See, e.g.*, S. Rep. No. 192, 99th Cong., 1st Sess. 6 (1985) (by 1909,

ninety percent of lands allotted to full bloods had been sold or mortgaged, and eighty percent of reservation land was owned by non-Indians). The loss of tax-exempt status allowed state and county governments to tax the allotments, many of which were later lost through tax forfeitures. Peterson, *supra*, at 175-76.

Subsequently, courts interpreting the Clapp Amendment emphasized its distinction between full and mixed blood Indians and also concluded that contrary to the original assumption, full bloods continued to enjoy a limited trust relationship under the Amendment. These decisions, which set aside certain sales, prompted Congress to create a commission to compile a roll indicating whether an allottee was of full or mixed blood. 38 Stat. 77, 88-89 (1913). The Clapp Amendment was widely interpreted as having ended the trust relationship between the federal government and mixed bloods. For example, in 1915 the Solicitor for the Department of the Interior ("DOI" or "Interior") concluded that the Amendment had terminated his duty to probate the estates of mixed blood allottees, Opinion of the DOI Solicitor, No. D-29636 (Aug. 2, 1915)—seemingly in disregard of the Secretary's duty to determine the heirs of allottees who had died before expiration of the trust period, 36 Stat. 855 (1910) (codified at 25 U.S.C. § 372). Minnesota state courts assumed this probate function.

In *Morrow v. United States*, 243 F. 854 (8th Cir. 1917), however, the Eighth Circuit held that trust patents vested in mixed blood allottees an unalterable property right to tax immunity for twenty-five years and suggested that the Clapp Amendment could not unilaterally terminate the trust relationship. Thus, *Morrow* voided tax forfeitures of trust properties and cast doubt upon the validity of many land transfers made from 1906 to 1917. Nonetheless, the Department of Justice, as counsel for the government, made only sporadic efforts to bring suit on behalf of Indians whose land had been illegally conveyed. This lack of enforcement action continued despite successive extensions of the trust period. *See* Exec. Orders No. 4642 (1927), No. 5768 (1931), and No. 5953 (1932); Indian Reorganization Act of 1934, 25 U.S.C. § 462 (1982) (extending trust indefinitely).

In the late 1970's, several events forced a change in this pattern of neglect of the Indians' legal rights. The most important was the Minnesota Supreme Court's decision in *State v. Zay Zah*, 259 N.W.2d 580 (Mn. 1977), *cert. denied*, 436 U.S. 917 (1978), holding that the Clapp Amendment could not unilaterally abrogate the trust status of a White Earth allotment. Thus, allotments held in trust by the United States retained their tax immunity until the patentee requested and received fee simple title. *Id.* at 586. The court concluded that the allotment at issue was not subject to tax forfeiture and that equitable title remained in the allottee's heirs. *Id.* at 586-89.

In 1979, the DOI Solicitor interpreted *Zay Zah* as invalidating title acquired not only through tax forfeiture, but also through state probate awards and "other forms of involuntary alienation" (e.g., purchase, without Interior's approval, from mixed blood Chippewas under twenty-one years of age). *See* DOI Memorandum from the Solicitor to the Assistant Secretary, Indian Affairs (May 9, 1979), *reprinted in* White Earth Indian Land Claims Settlement: Hearings on S.1396 before the Senate Select Comm. on Indian Affairs, 99th Cong., 1st Sess. at 102-06 (1985) ("Hearings on S.1396"). Reversing the Solicitor's 1915 opinion, the Interior Department acknowledged its duty to re-probate all estates and make current heirship determinations. *Id.* Accordingly, the Department's Bureau of Indian Affairs sent hundreds of letters advising holders of land from the original White Earth Reservation about possible title defects and notifying them that the agency would "make every attempt to clear the United States' title to these lands" and would recommend to the Justice Department that suits be filed on behalf of the Indians to recover illegally appropriated land and related damages. *See* Hearings on S.885 before the Select Comm. on Indian Affairs, 98th Cong., 1st Sess. at 116-18 (1983) (reproducing letters).

Zay Zah and the DOI's actions clouded title to over 100,000 acres in Becker, Clearwater, and Mahnomen Counties in Minnesota and involved transfers that had, in major part, taken place more than half a century earlier. *See* S. Rep. No. 192 at 11. Even though the Justice Department never actually brought

any suits, the threat of legal action resulted in social and economic chaos. *See* Hearings on S.1396 at 117-21, 148-52.

B. The White Earth Reservation Land Settlement Act

To foreclose the possibility of interminable litigation, on March 24, 1986, Congress passed the White Earth Reservation Land Settlement Act, Pub. L. No. 99-264, 100 Stat. 61, *reproduced at* 25 U.S.C. § 331 (note) ("WELSA" or "Act"). Congress found that "claims on behalf of Indian allottees or heirs and the White Earth Band involving substantial amounts of land . . . are creating great hardship and uncertainty for government, Indian communities, an non-Indian communities," and that it was in the long-term interest of all affected parties to implement a fair settlement of the unresolved, legally uncertain claims. *Id.* § 2.

The Act extinguishes claims for land and damages by White Earth allottees and their heirs in return for administratively determined compensation. Section 7 directs the Secretary of the Interior to investigate all reservation allotments and to list in the Federal Register and specified newspapers those allotments, or interests in allotments, that fall within the categories enumerated in sections 4(a), 4(b), and 5(c) (e.g., tax forfeitures, unapproved sales by full bloods and minors, and sales by court-appointed representatives). Section 8(a) sets the compensation at the fair market value of the land at the time of the defective transaction, less compensation already received, plus five percent interest compounded annually from the date of transfer until March 24, 1986 (the date of the Act's enactment), and at the DOI's general interest rate thereafter. Section 8(c) requires the Secretary to provide allottees or their heirs with written notice of the compensation due them.

Section 6(d) permits any claimant to challenge the constitutional adequacy of such compensation as applied to his particular allotment or interest by filing suit under the Tucker Act, 28 U.S.C. § 1491, within 180 days of receiving notice of the Secretary's compensation determination. Bringing such an action, however, precludes a claimant from receiving compensation under section 8. Section 6(c) similarly provides that filing an

action in federal court to recover title and damages bars statutory compensation. Section 6(c) further states that such lawsuits will be barred after the later of 180 days following the enactment of WELSA or the date the Secretary publishes a notice in the Federal Register that the conditions set forth in section 10 have been met; namely, that Minnesota donate 10,000 acres of "reasonable value" to the United States to be held in trust for the White Earth Band and appropriate $500,000 for technical assistance, and that Congress appropriate $6.6 million for the Band. On March 21, 1988, approximately two years after WELSA's enactment, the Secretary published a notice that these conditions had been fulfilled. *See* 53 Fed. Reg. 9150.

Finally, section 8(d) of the Act provides that the Secretary's administrative determination of appropriate compensation "may be judicially reviewed pursuant to the Administrative Procedure Act," 5 U.S.C. §§ 701-706 (1982), within 180 days of issuance of notice, with exclusive jurisdiction vested in the United States District Court for the District of Minnesota.

C. The Indians' Claims and the District Court's Decision

White Earth Band members have challenged WELSA on two Fifth Amendment grounds. First, they argue that section 6(c)'s statute of limitations violated their Due Process rights by failing to grant them a reasonable opportunity to bring suits to recover land and damages. Second, the Indians contend that the Act effected a "taking" of their property on the date WELSA's statute of limitations expired (thereby extinguishing their legal claims), and that the Act's payment provisions do not ensure just compensation.

In *Littlewolf v. Hodel* 681 F. Supp. 929 (D.D.C. 1988), the district court rejected these arguments and rendered summary judgment against Band members who sought a declaratory judgment that WELSA was unconstitutional. In its Due Process analysis of the statute of limitations, the trial court initially focused on whether, under all the circumstances, plaintiffs had a "reasonable time" to commence an action—a judgment left to the legislature "unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Id.* at

939, citing *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902); *see also Texaco v. Short*, 454 U.S. 516, 527-28 (1982). The court observed that there was nothing "presumptively unreasonable about this limitations period," citing cases upholding statutes of limitations from six months to a year in duration. 681 F. Supp. at 940. The court then concluded that the period at issue was "unquestionably reasonable in light of the legislative goals underlying the White Earth Act," namely, the quieting of title by giving White Earth allottees' heirs the choice of either promptly bringing an action or relinquishing their land claims in return for an administratively determined monetary settlement. *Id.* The court noted, however, that as a result of the delay in certification, potential claimants had actually had over twenty-three months within which to bring suit. *Id.* at n.6.

Turning to the Band's argument that their status as trust beneficiaries and their distressed circumstances required special consideration, the district court concluded that reasonable statutes of limitations (such as the Act's) apply even where trust obligations exist. 681 F. Supp. at 940-41, citing, *e.g., United States v. Mottaz*, 476 U.S. 834 (1986). The court also dismissed the White Earth Band's argument that its members' poverty and lack of education made it unrealistic—hence inherently unreasonable—for them to bring suit within the limitations period because, regardless of actual ignorance or lack of financial resources, plaintiffs' knowledge of their affairs and legal rights would be imputed, 681 F. Supp at 941-42, citing, *inter alia, Menominee Tribe v. United States*, 726 F.2d 718 (Fed. Cir.), *cert. denied*, 469 U.S. 826 (1984). The court further ruled that Congress had provided the Indians with adequate notice of their right to sue. 681 F. Supp. at 942-44.

The district court also rejected plaintiffs' claims under the "takings" clause, holding that the payment provided under section 8 of WELSA, coupled with the availability of a Tucker Act remedy in those cases where an allottee or heir considered such payment inadequate, constituted just compensation. *Id.* at 944-48.

The White Earth class claimants have appealed; this court has jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. Introduction

Appellants face formidable obstacles in challenging the White Earth Land Settlement Act. First, federal statutes enjoy a presumption of constitutionality, especially where, as here, Congress explicitly considered constitutional questions. *Littlewolf*, 681 F. Supp. at 938, citing *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). This deference acknowledges Congress' role as the policymaking branch. Here, for example, it balanced the competing interests of the White Earth Band, government bodies, and non-Indian communities in light of complex historical, legal, economic, and social factors. Second, courts have been reluctant to interfere with Congress' plenary power over Indian affairs (derived from Article I, § 8, cl. 3), especially in property matters. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding statute ceding Indian land without tribe's consent and in abrogation of treaty).

Though plenary, Congress' power is not absolute. "While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (quoting *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935)); *see generally* F. Cohen, *Handbook of Federal Indian Law* 220-21 (1982 ed.). This guardian-ward relationship derives from the historical status of Indian tribes as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and the correspondingly pervasive federal control over Indians as embodied in treaties and statutes. Indeed, in this instance Congress expressly acknowledged its role as guardian by creating "trust" obligations on the part of the United States in the General Allotment and Nelson Acts.

Traditionally, courts have enforced trusteeship duties only against executive branch officers, usually under a common law fiduciary duty theory. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942). In contrast, courts have viewed Congress' trust responsibility as merely a moral obligation to

deal with Indians in good faith, and have treated federal Indian laws as raising non-justiciable political questions. *See, e.g., Lone Wolf*, 187 U.S. at 565-66. *See generally* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1223-34 (1975) (discussing disparity in judicial application of trust duty against executive and legislative branches). As the Supreme Court noted in *Sioux Nation*, however, *Lone Wolf*'s Indian political question doctrine "was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977)," which "establish[ed] a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment." 448 U.S. at 413 & 414 n.28. The *Weeks* test focuses on whether the statute's objectives are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Weeks*, 430 U.S. at 85 (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). Of course, courts have the power to invalidate any law that violates the Constitution. *See, e.g., Sioux Nation, supra*; *Hodel v. Irving*, 481 U.S. 704 (1987).

In this case, we must examine appellants' constitutional challenges in light of both Fifth Amendment principles and a determination of whether Congress' exercise of its plenary power was reasonably related to its trust responsibility to the White Earth Band.

B. The Indians' Constitutional Claims

1. *General Considerations*

The district court found, as an initial matter, that despite the constraint placed on property rights by the Act's six-month limitation on the filing of claims, the limitation was valid because it was "rationally related to the government's legitimate interest in protecting thousands of Indian claimants from the need to litigate thousands of expensive, time-consuming individual actions to recover any compensation for their claims." 681 F. Supp. at 939. We agree that Congress' stated justification meets *Weeks*' "tied rationally" test. Nevertheless, although we do not question Congress' objectives, we must determine whether the

means chosen to achieve those legitimate ends comport with the requirements of the Fifth Amendment, which states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. *Due Process Claims*

White Earth Band members argue that WELSA contains not a typical *limitations* provision designed to bar stale claims but, rather, an unreasonably short limitations period designed to prevent Indians with valid claims from having access to the courts. They assert that the Act unfairly deprives them of their property interests without due process by failing to provide them adequate notice and a reasonable period within which to assert their rights.

Specifically, appellants charge that that the United States has breached its trust obligation to identify and investigate their land claims and to disclose factual information within the government's control that is necessary to enable members of the Band to bring their claims. The Indians contend that they justifiably relied on two promises made by the federal government in 1979 to fulfill its trust responsibilities. One was the Bureau of Indian Affairs' assertion, in letters to hundreds of landholders, stating its intention to make every attempt to clear title. The other was the Interior Department's acknowledgment of its statutory duty, neglected for over six decades, to probate the White Earth allottees' estates—a process that will supersede state and county title records. The Indians argue that as the government has already had a decade to conduct this re-probate and will take several more years to compile the lists necessary for determining WELSA compensation, it is unreasonable for Band members to be allowed only six months or even two years to sue on these claims.

We find it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act. Even if we assume *arguendo* that the six-month limitations period is unreasonably short and that,

as a consequence, the Act effectively "takes" the Band members' property rights, we conclude that the statute provides the Indians with just compensation, for the reasons discussed below.

3. *Just Compensation Issues*

The Act contains two major compensation provisions. First, section 8 authorizes the Secretary of the Interior to make an administrative determination of the appropriate amount of payment for each unlawfully transferred allotment, computed at "the fair market value of the land interest . . . as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer" described in sections 4(a), 4(b), and 5(c), plus interest compounded annually at five percent from this date. *Id.* § 8(a).

Second, section 6(d) permits allottees entitled to statutory compensation to challenge the constitutional adequacy of the amount of this compensation by filing suit under the Tucker Act, 28 U.S.C. § 1491. If Congress had simply prescribed the ordinary Tucker Act procedure, which allows an action to be brought in the Court of Claims "within six *years* after such claim first accrues," 28 U.S.C. § 2501 (emphasis added), there would be little dispute about WELSA's validity under the Fifth Amendment; a Tucker Act "safety net" suffices when "a statute's 'basic compensation scheme . . . is valid but could result in payment of less than the constitutional minimum.' " *Littlewolf*, 681 F. Supp. at 946 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150 (1974)).

Section 6(d), however, requires that such suits be brought within six *months* after the date on which the Secretary issues the notice of compensation determination that must be given to an allottee or his heirs pursuant to section 8(c). Furthermore, section 6(d) provides that Indians who choose to file a Tucker Act suit must forego their administrative compensation. The Chippewas argue that this six-month limitations period, coupled with the possibility that they may fail to receive any award, renders the Tucker Act safety net a "delusive remedy."

The district court disagreed. It interpreted the Tucker Act as barring suits unless brought within six years of the date the

property was taken (or when the owner had "constructive notice" of the taking). 681 F. Supp. at 947. As the administrative notification date would "almost certainly" occur more than six years after the taking (or constructive notice thereof), the court concluded that the Indian claimants would have had at least six years (and probably more) to file suit. *Id.*

Conceding that some plaintiffs might not learn of the "taking" until they received notice pursuant to section 8(c) and would therefore be deprived of the Tucker Act's six-year grace period, the district court nonetheless upheld the validity of the six-month limitations period because it could not "fault Congress' judgment that White Earth claimants could reasonably bring suit for just compensation within six months after receiving an administrative determination of the amount of compensation to which they are entitled." *Id.* at 947-48. The court further noted that the factual record compiled by the Secretary would enable an allottee to bring suit far more swiftly than an ordinary Tucker Act claimant. *See id.* at 948.

We agree with the district court's conclusion that the Act's payment provisions represent "a good faith effort to compensate plaintiffs fairly" under the Just Compensation clause and that the six-month period allowed for filing a Tucker Act claim meets Due Process standards. *Id.* at 946. First, we conclude that section 8's basic compensation mechanism will yield a fair payment in most cases and therefore does not, on its face, violate the Just Compensation clause. *See, e.g., United States v. Creek Nation*, 295 U.S. 103, 111-12 (1935) (just compensation requires payment of amount equivalent to fair market value of land plus reasonable interest). Moreover, the Tucker Act "safety net" ensures full compensation in those particular instances where the statutory payment might not adequately compensate claimants.

Second, under the circumstances of this case, we find that section 6(d)'s six-month period following notice of the Secretary's determination of compensation provides as meaningful Due Process protection as a six-year period without notice. By enacting this statute, Congress has alerted White Earth Band members that the Secretary will be processing information about each allotment over the next several years and that he will

notify interested allottees and heirs of his final compensation determinations. In light of this notice and the availability of detailed data about the allotments, six months is a reasonable period in which to file a challenge. It follows that we also find adequate the 180-day limit imposed by section 8(d) on challenges to administrative determinations brought under the Administrative Procedure Act.

If an Indian elects to sue under the Tucker Act rather than accept the amount proffered by the Secretary, that action would be the appropriate forum in which to determine the nature of the property interest taken (i.e., land or legal claims) and the precise date of the taking for valuation purposes. Hence, we need not address the Band's argument that the "taking" occurred on the date that WELSA's limitations period expired (March 21, 1988) and extinguished the Indians' legal claims—not at the time the property was illegally transferred (e.g., to private parties), and that the property's value should be measured accordingly. *But see Littlewolf*, 681 F. Supp. at 945-46 ("taking" occurred on date allotment improperly alienated and government/trustee failed to intervene, entitling claimant to compensation consisting of fair market value of land on date of taking, plus a reasonable interest rate). As we find it unnecessary to reach this issue, we express no opinion as to the district court's discussion of it.

In sum, we hold that the Act's compensation provisions meet constitutional requirements under both the Just Compensation and Due Process clauses.

III. Conclusion

Exercising its plenary power over Indian affairs, Congress carefully balanced competing interests and considered complex historical, social, legal, and economic factors before passing the White Earth Reservation Land Settlement Act. Consistent with separation of powers principles, this court's task is not to determine whether the Act achieves perfect justice, but rather to ensure that it conforms with both the federal guardianship responsibility and the Constitution. As we conclude that the Act meets both standards, we affirm the district court's judgment.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. No. 87-822

March 17, 1988

Edna Emerson LITTLEWOLF, et al.,

Plaintiffs,

—v.—

Donald Paul HODEL, et al.,

Defendants,

—and—

State of Minnesota, et al.,

Defendant-Intervenors.

Robert C. Odle, Jr., Alan J. Weinschel, R. Bruce Rich, Steven C. Schwartz, and Melissa G. Salten, Weil, Gotshal & Manges, Washington, D.C., Michael D. Ratner, David Cole, and Mahlon Perkins, Center for Constitutional Rights, New York City, for plaintiffs.

Edward J. Passarelli, U.S. Dept. of Justice, Land and Natural Resources Div., Washington, D.C., Michael D. Cox and Mariana Shulstad, Office of the Sol., U.S. Dept. of Interior, and on brief, F. Henry Habicht, II, Asst. Atty. Gen., and Roger J. Marzulla, Acting Asst. Atty. Gen., Washington, D.C., for defendants.

James M. Schoessler, Asst. Atty. Gen., William A. Szotkowski, Sp. Asst. Atty. Gen., and, on brief, Hubert H. Humphrey, III, Atty. Gen., State of Minn., St. Paul, Minn., for defendant-intervenor State of Minn.

Bruce J. Terris and Kathryn A. Bleecker, Terris, Edgecombe, Hecker & Wayne, Washington, D.C., Charles K. Dayton and Nancy Wiltgen Reibert, Pepin Dayton Herman & Graham, Minneapolis, Minn., for defendants-intervenors Becker, Clearwater and Mahnomen Counties.

INTRODUCTION

CHARLES R. RICHEY, *District Judge*:

In this case, plaintiffs, twenty-two members of the White Earth Band of Chippewa Indians, seek a judgment declaring that the White Earth Reservation Land Settlement Act of 1985 ("the White Earth Act" or "the Act") is unconstitutional. In the alternative, plaintiffs ask the Court to find that the defendants have failed to abide by certain trust obligations owed to plaintiffs; if the Court so finds, they also ask the Court to order defendants to perform those duties before taking any further action under the White Earth Act.

Plaintiffs have asked for a preliminary injunction and for summary judgment on their claims. In addition, they seek certification of a class, pursuant to Fed.R.Civ.P. 23(b)(2), consisting of "all Indians whose claims to land on the White Earth Reservation have been adversely affected by the White Earth Reservation Land Settlement Act." *Plaintiffs' Motion for Class Certification*, at 2. Defendants oppose the plaintiffs' motions and also ask the Court to dismiss the action, a motion that the Court will treat as one for summary judgment, pursuant to Fed.R.Civ.P. 12(b).[1] Defendant-intervenors ask for summary judgment in their favor.

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1 Defendants did not rest on the complaint but submitted material outside the pleadings. As the Court will consider that material, the Court will treat defendants' motion as one for summary judgment, rather than a motion to dismiss the complaint for failure to state a claim. Fed.R.Civ.P. 12(b). *See Appendices to Memorandum of Supporting Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in Reply to Opposition to Motion to Dismiss.*

Due to exigencies of time, the Court combined a hearing on the preliminary injunction with a hearing on the defendants' and defendant-intervenors' motions and a hearing on the merits. The Court has also heard from the parties on the class certification motion. After carefully considering the arguments advanced in Court, the voluminous memoranda and exhibits submitted by the parties and intervenors, and the underlying law, the Court will grant plaintiffs' motion for class certification. The Court will also, however, grant defendants' and defendant-intervenors' motions for summary judgment.

AS THERE ARE NO MATERIAL FACTS IN DISPUTE, SUMMARY JUDGMENT IS APPROPRIATE

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The facts in this case are undisputed and are necessary background to the legal analysis that follows.

Through a series of treaties culminating in the White Earth Treaty of 1867, 16 Stat. 719, the Chippewa Indians ceded most of their lands in Minnesota in exchange for certain payments and establishment of the 830,000-acre White Earth Reservation. Under the General Allotment Act of 1887 (better known as the Dawes Act) and the Nelson Act of 1889, Congress established and applied to the Chippewa Indians a system for converting this and other reservation land to individual ownership; the Acts also provided that the United States would hold each individually allotted parcel in trust for a period of time. Subsequent statutes and Executive Orders so extended this trust period that the trust has never terminated. *See Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 462; Act of June 25, 1910*, 36 Stat. 855 (*codified at 25 U.S.C. 372*); *Nelson Act of 1889, 25 Stat. 642; General Allotment Act of 1887, 24 Stat. 388; Executive Orders Nos. 5953 (1932), 5768 (1931), 4642 (1927).*

Seemingly in disregard of this trust obligation, Congress enacted the Clapp Amendment of 1906, which removed all

restrictions on alienation of land allotments to adult "mixed blood" members of the White Earth Band of Chippewa and authorized the Secretary of the Interior to grant unrestricted fee simple land patents to sufficiently competent adult full-blood Chippewa. 34 Stat. 353. As a result, these lands no longer enjoyed the tax-exempt status of properties held in trust by the federal government. *See Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 665, 56 L.Ed. 941 (1912). State and local governments began to tax the allotted properties, many of which were lost through tax forfeitures. *See State v. Zay Zah*, 259 N.W.2d 580 (Minn.1979), *cert. denied*, 436 U.S. 917, 98 S.Ct. 2263, 56 L.Ed.2d 758 (1978).

In 1979, the Minnesota Supreme Court held that an Indian's vested right to freedom from taxation on allotments held in trust by the United States could not be altered by the Clapp Amendment and, therefore, the tax forfeiture of plaintiff's allotment was invalid. *Id.* This decision clouded title to vast areas of Minnesota land. In response to this untenable situation, Congress enacted the White Earth Reservation Land Settlement Act of 1985. *See, e.g.*, Pub.L. 99-264 § 2, 100 Stat. 61 (hereafter "White Earth Act"); S.Rep. 192, 99th Cong. 1st Sess. 1 (1985).

Under this Act, the land claims of White Earth Indians who do not choose to sue for the land itself are extinguished in exchange for compensation at a rate specified in the Act. *See* White Earth Act, § 8. The Act also provides a statute of limitations for suits by allottees seeking to recover the actual land allotments. These suits must be brought within 180 days after the Act's enactment (*i.e.*, October 24, 1986) or before the Secretary of the Interior publishes a Certification that certain events have occurred,[2] whichever is later.

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2 Under the Act, the Secretary must publish a certification that (1) the State of Minnesota has agreed to transfer 10,000 acres to the United States in trust for the White Earth Band of Chippewa Indians; (2) the State has appropriated $500,000 for technical and computer assistance for implementing the land claims settlement; and (3) the United States has appropriated $6.6 million for economic development for the benefit of the White Earth Band. White Earth Act, §§ 6(a), 10. Plaintiffs filed their motion for a preliminary injunction after learning that the Secretary will imminently publish this Certification.

THE COURT MUST GRANT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2), plaintiffs have moved to certify a class consisting of "all Indians whose claims to land on the White Earth Reservation have been adversely affected" by the White Earth Act. *Plaintiffs' Motion for Class Certification*, at 2. The Court must grant this motion.

Under Fed.R.Civ.P. 23, a party may bring a class suit if the class is so numerous that joinder is impracticable, there are common questions of law or fact, the parties' claims are typical of the class claims, and the representative parties will fairly and adequately protect the interest of the class. A party seeking certification under Fed.R.Civ.P. 23(b)(2) must also be able to show that those opposing the class acted or refused to act on "grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs satisfy these criteria.

No party disputes plaintiffs' contention that several thousand members of the White Earth Band may have a land claim that is affected by the White Earth Act. Accordingly, plaintiffs more than meet the test for numerosity of class members. *See, e.g., E.E.O.C. v. Printing Industry, Inc.*, 92 F.R.D. 51, 53 (D.D.C. 1981). Similarly, there is no dispute that plaintiffs' claims revolve around questions of law that will affect all members of the potential plaintiff class. As such, plaintiffs satisfy the "common questions of law or fact" inquiry. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557-58, 61 L.Ed.2d 176 (1979); 1 *Newberg on Class Actions* § 3.10 (1985).

Since the parties agree that injunctive and declaratory relief are the only remedies that the Court could issue in this case, the sole areas of controversy concern whether plaintiffs raise claims typical of those of the absent class members and whether plaintiffs will adequately represent the absentees. Despite the strenuous protests of defendants and defendant-intervenors, the Court finds that plaintiffs satisfy these requirements as well.

The typicality requirement ensures that the claims of the representative and absent class members are sufficiently similar so

that the representatives' acts are also acts on behalf of, and safeguard the interests of, the class. *See* 7A C.A. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure: Civil* § 1764. When, as here, the representatives and the absent class members would proceed on the same legal theory and would raise claims arising from the same event or course of conduct, the class members are deemed to be raising claims "typical" of those of the class as a whole. *Id.*; *see also Streicher v. Prescott*, 103 F.R.D. 559, 561 (D.D.C. 1984); 1 *Newberg on Class Actions* § 3.13.

Defendants and defendant-intervenors maintain that plaintiffs fall short of the typicality requirement because the named plaintiffs do not allege that they represent every possible category of land claimant. In addition, they argue that plaintiffs impermissibly rely on their racial identity with other White Earth members as proof of their typicality. Defendants and defendant-intervenors misapprehend the nature of the plaintiffs' case.

The types of land claims plaintiffs could allege in an action to recover allotted land are utterly irrelevant to this suit. Here, plaintiffs ask the Court to consider the constitutionality of a statute governing all White Earth Band land claims, or, in the alternative, to force the United States to carry out certain trust duties before those land claims may be settled or vindicated. As any person who has a claim under the statute could lodge this exact suit, factual distinctions between the underlying claims have no bearing on the named plaintiffs' "typicality." *See, e.g., Wagner v. Taylor*, 836 F.2d 578, 591 (D.C.Cir.1987); *Pratt v. Heckler*, 629 F.Supp. 1496, 1503 (D.D.C.1986).

Similarly, defendants and defendant-intervenors wrongly suggest that the named plaintiffs rely solely on their racial heritage as proof of the similarity of their claims to those of other White Earth Band members. This is not so. Rather, plaintiffs bring claims that are closely related, in cause and legal theory, to the claims that could be asserted by any individual affected by the White Earth Act. Plaintiffs' racial heritage is neither the ground of their legal claim nor a fact underlying that claim. As such, the law's proscription against the use of racial identity to support a finding of typicality is not relevant to this case. *See*

General Telephone Co. v. Falcon, 457 U.S. 147, 159 n. 15, 102 S.Ct. 2364, 2371 n. 15, 72 L.Ed.2d 740 (1982).

Finally, plaintiffs must prove that they "fairly and adequately" represent the proposed class. This requirement incorporates two principal criteria: " '1) the named representative[s] must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representatives must appear able to vigorously prosecute the interests of the class through qualified counsel.' " *National Association for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458 (D.C.Cir.1983), *cert. denied sub nom. Wagshal v. Crozer-Chester Medical Center*, 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984) (*quoting National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C.Cir.1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2674, 53 L.Ed.2d 270 (1977); *Arnett v. American National Red Cross*, 78 F.R.D. 73, 75 (D.D.C.1978). Defendants and defendant-intervenors argue that there may be members of the White Earth Band who are satisfied with the remedies available under the White Earth Act and would not challenge the Act's constitutionality. As such, they maintain, plaintiffs do not meet the "adequacy of representation" test.[3]

Basic considerations of fairness require the Court to undertake a searching inquiry into the adequacy of representation, for any representation that falls short of the standard may well infringe the due process rights of absent class members. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 45, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *National Association for Mental Health, Inc. v. Califano*, 717 F.2d at 1457. This inquiry must be especially careful in a motion for class certification under Fed.R.Civ.P. 23(b)(2),

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3 Neither defendants nor defendant-intervenors challenge the qualification of plaintiffs' counsel, who are able and experienced members and associates of the law firm of Weil, Gotshal & Manges as well as equally able and experienced counsel associated with the Center for Constitutional Rights. Plaintiffs' counsel are fully able to prosecute this suit with as much vigor, willingness, and competence as the Court could wish of any class counsel. As such, they thoroughly satisfy the Rule 23(a)(4) requirements. *See, e.g., National Association for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458 (D.C.Cir.1983), *cert. denied sub nom. Wagshal v. Crozer-Chester Medical Center*, 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984).

as members cannot "opt out" of a class certified under that provision of the rule. *See Federal Practice and Procedure*, § 1793.

The Court is satisfied that class certification is proper in this case. While actual antagonism between class members, or a "strong likelihood" of antagonism, would defeat class certification, *see, e.g., Fink v. National Savings & Trust Co.*, 772 F.2d 951, 965 (D.C.Cir.1985) (Scalia, J., concurring in part and dissenting in part); *Phillips v. Klassen*, 502 F.2d 362, 366-67 (D.C.Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974), incantations of the *potential* for antagonism are insufficient. As defendants have not even attempted to show that there is *any* likelihood that class members have antagonistic interests, the Court cannot be persuaded by defendants' arguments. *See Robbins v. Kleindienst*, 383 F.Supp. 239, 241 (D.D.C.1974).[4]

Defendants and defendant-intervenors have advanced one additional argument against class certification. They argue that, because plaintiffs seek either injunctive relief or relief that is (allegedly) beyond the Court's authority to order, class certi-

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4 As such, this case is fully distinguishable from two earlier cases in this circuit that may appear to cast doubt upon class certification in the face of claimed antagonism among class members. In both *Phillips v. Klassen*, 502 F.2d 362 (D.C.Cir.1974), and *Melong v. Micronesian Claims Commission*, 643 F.2d 10 (D.C.Cir.1980), there was evidence in the record suggesting that at least some class members were satisfied with the challenged law or practice. *See Melong v. Micronesian Claims Commission*, 643 F.2d at 15 n. 7. There is not even a hint of such evidence in this case.

Moreover, some courts, relying on the theory that conflicting interests are important only because they suggest that some class members are inadequately represented, have held that the problem is overcome when *any* party to the suit espouses the conflicting point of view. Under those cases, if the absentees' views will be fully represented by *some* party—even if by an opposing party—the absentees' interests are protected and the conflict does not defeat class certification. *See Dierks v. Thompson*, 414 F.2d 453, 456-57 (1st Cir.1969); *Stotz v. United Brotherhood of Carpenters & Joiners*, 620 F.Supp. 396, 405 (D.Nev.1985); *Sturdevant v. Deer*, 73 F.R.D. 375, 378 (E.D.Mich.1976); *Rota v. Brotherhood of Railway, Airline & S.S.Clerks*, 64 F.R.D. 699, 706 (N.D.Ill.1974); *see also* 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1768 (1986). Because these authorities are at odds with both Rule 23 and traditional notions of alignment of parties and interests, the Court will not rely on them.

fication is unnecessary and should be denied. The Court cannot agree with this line of reasoning.

Defendants and defendant-intervenors have cited, and the Court is aware of, many cases (although none from the Court of Appeals for this Circuit) holding that class certification may be denied if "unnecessary." *See, e.g., Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir.1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974); *Gray v. International Brotherhood of Electrical Workers*, 73 F.R.D. 638, 640-41 & n.5-7 (D.D.C.1977). These cases are far from dispositive, since, "[l]ike Newton's Law of Thermodynamics, for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances." 1 *Newberg on Class Actions* § 4.19; *see also Ridgeway v. International Brotherhood of Electrical Workers*, 74 F.R.D. 597, 601 (N.D.Ill.1977) (necessity requirement a "minority approach").

Indeed, the Court is confident that certification under Rule 23(b)(2) is proper regardless of need or the lack thereof. Rule 23(b)(2) specifically makes the class suit device available when only injunctive relief is sought. Were class certification inappropriate if "unnecessary," it would be inappropriate whenever only injunctive relief is sought, as the proposed relief would apply to all persons, whether class members or not. Thus, the idea that a class may be certified only if "necessary" flies in the face of the Federal Rules. *See* Note, *The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2)*, 67 Geo.L.J. 1211 (1979).

Moreover, it is not clear that the necessity argument favors defendants and defendant-intervenors. Plaintiffs have asked, if the Court upholds the constitutionality of the White Earth Act, that the Court order the federal defendants to perform their alleged trust obligations to plaintiffs before certain of the Act's provisions take effect. As this relief would apply only to trust obligations owed plaintiffs, the absentees could not benefit from the order unless the class were certified. Hence, certification would be "necessary" for the absent members of the plaintiff class to benefit from the alternative relief sought.

Defendants argue that the Court has no power to order such relief and, therefore, the requested alternative relief offers no ground for class certification. But the propriety of class certification does not depend on the merits of the underlying suit; all the Court may consider is whether the movant has met the requirements of Rule 23. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974). Defendants' argument, therefore, fails to bolster its opposition to class certification.

In sum, plaintiffs satisfy the criteria for class certification. The Court will therefore grant the motion to certify a plaintiff class consisting of all members of the White Earth Band who were adversely affected by the White Earth Land Settlement Act of 1985.

Plaintiffs' Constitutional Challenges to the White Earth Act

Plaintiffs have raised several challenges to the constitutionality of the White Earth Act. Specifically, plaintiffs claim that the Act violates their due process rights by failing to afford them an adequate opportunity to bring a land claims suit and by forcing them to elect between bringing a land claims suit and seeking a remedy under the Act. They also claim that members of the plaintiff class have received inadequate notice of their right to bring land claim suits, which plaintiffs maintain violates their due process rights and the government's trusteeship obligations. Plaintiffs further argue that the White Earth Act effects a taking of property without just compensation, in violation of the Fifth Amendment, and they maintain that the Tucker Act remedy provided by the statute does not remedy this constitutional infirmity.

The Court will address each of plaintiffs' arguments in turn. As an initial proposition, however, the Court must note the heavy burden plaintiffs face in their challenge to the constitutionality of a federal statute. From the legislative history, it is clear that Congress was quite concerned with the constitutionality of the White Earth Act and passed the legislation only after satisfying itself that all portions of the Act were constitutional.

See, e.g., Cong.Rec. S17589 (daily ed. Dec. 13, 1985); Cong.Rec. S17490 (daily ed. Dec. 12, 1985). In such a situation, deference to the Congressional enactment is particularly appropriate:

> The Congress is a coequal branch of government whose Members take the same oath [as members of the judiciary] to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 [71 S.Ct. 624, 644-45, 95 L.Ed. 817] (1951), we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.' The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.

Rostker v. Goldberg, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981); *see also Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666 (1947).

With this principle firmly in mind, the Court will now consider each of plaintiffs' constitutional challenges.

A. The White Earth Act statute of limitations does not violate the Constitution.

As an initial point, the Court notes that, in general, Congress may impose a constraint or duty on vested property rights if its action is rationally related to a legitimate governmental interest. *See, e.g., United States v. Locke*, 471 U.S. 84, 104, 105 S.Ct. 1785, 1798, 85 L.Ed.2d 64 (1985); *Mills v. Habluetzel*, 456 U.S. 91, 100-01, 102 S.Ct. 1549, 1555-56, 71 L.Ed.2d 770 (1982); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83-85, 98 S.Ct. 2620, 2635-37, 57 L.Ed.2d 595 (1978). This principle changes slightly in the Indian law context, as federal action toward Native Americans must be construed in light of the government's generalized trust responsibility toward

them. *See, e.g., Cohen's Handbook on Indian Law* 220-21 (1982). Because of this trust responsibility, legislation must be "tied rationally" to a legislative effort *to protect and serve the interests of Native Americans. Id.* at 221; *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84, 41 L.Ed.2d 290 (1974); *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942).

Although plaintiffs have advanced a host of challenges to the White Earth Act's statute of limitations, the Court must find that the Act's limitations period is rationally related to the government's legitimate interest in protecting thousands of Indian claimants from the need to litigate thousands of expensive, time-consuming individual actions to recover any compensation for their claims. It matters not that the Act affects vested property rights; " 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.' " *United States v. Locke*, 471 U.S. at 104, 105 S.Ct. at 1797-98 (*quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2892-93, 49 L.Ed.2d 752 (1976)). As this principle applies even to legislation affecting federal trust responsibilities to Native Americans, *see Cohen's Handbook on Indian Law*, at 222-24, the White Earth Act statute of limitations meets this initial hurdle.

Beyond this general point, the Court must consider whether the limitations period is nonetheless an invalid invasion of plaintiffs' due process rights. Statutes of limitations affecting existing rights are constitutional if a "reasonable time is given for the commencement of the action before the bar takes effect." *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 632-643, 24 L.Ed. 365 (1877); *see also Kalis v. Leahy*, 188 F.2d 633, 635 (D.C.Cir.) *cert. denied*, 341 U.S. 926, 71 S.Ct. 797, 95 L.Ed. 1357 (1951). The reasonableness of the time period is primarily a judgment for the legislature, "unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson v. Iseminger*, 185 U.S. 55, 63, 22 S.Ct. 573, 575-76, 46 L.Ed. 804 (1902). As long as the statute is reasonable under all the circumstances—and, particularly, in light of the situation or emergency that impelled enactment of the law—the time bar comports with concepts of due process. *See, e.g., Tex-*

aco v. Short, 454 U.S. 516, 528, 102 S.Ct. 781, 791-92, 70 L.Ed.2d 738 (1982); *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 197, 42 S.Ct. 284, 286, 66 L.Ed. 559 (1922); *Wilson v. Iseminger*, 185 U.S. 55, 62-63, 22 S.Ct. 573, 575-76, 46 L.Ed. 804 (1902); *Saranac Land & Timber Co. v. Comptroller of New York*, 177 U.S. 318, 323-24, 20 S.Ct. 642, 644-45, 44 L.Ed. 786 (1900); *McGahey v. Virginia*, 135 U.S. 662, 706-07, 10 S.Ct. 972, 985-86, 34 L.Ed. 304 (1890).[5]

Section 6(c) of the White Earth Act provides that plaintiffs must bring suit to recover title to allotments within 180 days of the statute's enactment or prior to certification by the Secretary that certain specified events have occurred, whichever is later. This is the limitations period challenged by plaintiffs. As mentioned above, the federal defendants have stated that certification will occur if, and as soon as, the Court denies plaintiffs' challenges to the Act—in other words, certification will occur nearly two years after President Reagan signed the Act.[6]

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5 The corollary of this general rule is that statutes of limitations that are unreasonably short and "designed to defeat the remedy" are unconstitutional. *See Edwards v. Kearzey*, 96 U.S. (6 Otto) 595, 603, 24 L.Ed. 793 (1878). Pointing to statements by the White Earth Act's sponsors that the Act was designed to prevent litigation, plaintiffs maintain that the statute was "designed to defeat" the possibility of litigation and therefore is unconstitutional. This argument misconstrues both legal principles and the purpose of the White Earth Act itself. The Act is not designed to strip White Earth Band members of their claims to their land but to encourage out-of-court settlement of those claims according to the formula established by the Act. *See, e.g.*, White Earth Act § 2; S.Rep 192, 99th Cong., 1st Sess. 12 (1985). The statute of limitations contained in the Act is not unconstitutional simply because it furthers this purpose. *Edwards v. Kearzey*, 96 U.S. (6 Otto) at 603. Rather, even if the purpose of the statute of limitations was as underhanded as plaintiffs paint it, the time period itself must be so unreasonably short that it effectively deprives plaintiffs of the right to bring suit. *Id.*

6 Plaintiffs argue that, for the purposes of the due process challenge, the Court must regard the 180-day period as the appropriate statute of limitations because the date of certification is both uncertain and exclusively within the control of the United States and Minnesota. *Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment*, at 19 n.51. Although plaintiffs cite three cases as support for this proposition, none is on point. Rather, those cases involve either judicial discretion to toll statute of limitations on grounds of litigant's unfamiliarity

There is nothing presumptively unreasonable about this limitations period; courts have upheld statutes of limitations barring suit within similarly short periods of time. *See, e.g., DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (six months); *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713 (1920); *Turner v. New York*, 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392 (1897) (six months); *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 24 L.Ed. 365 (1877) (nine months, seventeen days); *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), *aff'd*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (one year). As long as the limitations period is reasonable under all the relevant circumstances, it passes the due process test.

The limitations period is unquestionably reasonable in light of the legislative goals underlying the White Earth Act. The Act was a response to *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), *cert. denied*, 436 U.S. 917, 98 S.Ct. 2263, 56 L.Ed.2d 758 (1978), which invalidated tax forfeitures of White Earth Band land and thereby clouded title to hundreds of thousands of acres of Minnesota land. The White Earth Act attempts to quiet title to this vast area of Minnesota by encouraging either prompt suit by the heirs of the Indian allottees or acceptance of a monetary settlement for the heirs' land and claims. *See* White Earth Act, §§ 2, 6(c), 8. Given the great social interest in quickly righting the wrongs done to the White Earth Band and

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with state procedure (*Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520 (1900)), the uncertainty that might follow retroactive application of a statute of limitations (*Lamb v. Power River Livestock Co.*, 132 F. 434 (8th Cir.1904)), and interpretation of a statute of limitations with a clause designed to afford additional time in which to sue on accrued causes of action (*Fullerton v. Lamm*, 177 Or. 655, 163 P.2d 941 (1945)).

Whatever arguments plaintiffs may once have been able to advance against use of the date of certification as the statute's time bar, they can no longer claim that the 180-day period controls. Potential allottees have had the opportunity to sue for their allotments long after the 180-day period expired. It would fly in the face of common sense for the Court to ignore the fact that, at least for the past twenty-three months, the statute of limitations has not run and allottees could have—and can still—bring suit.

in clearing title to so vast an area with equal speed, the limitations period appears reasonable.

This conclusion is buttressed by the venerable, and still valid, decision in *Turner v. New York*, 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392 (1897), *aff'd*, *Saranac Land & Timber Co.*, 177 U.S. 318, 20 S.Ct. 642, 44 L.Ed. 786 (1900). There, the Court upheld a six-month statute of limitation on actions to recover certain land sold for non-payment of taxes. Because the time bar merely demanded prompt action, and took away no rights, the Supreme Court held that the period was reasonable. 168 U.S. at 94, 18 S.Ct. at 40.

Plaintiffs argue, however, that such rules should not be applied to them because their personal circumstances transform an ordinarily reasonable time bar into an unreasonable one. They assert that the majority of the plaintiff class is poor, ill-educated, and ignorant of claims they relied on the government trustee to safeguard for them. However true these claims, they do not justify a finding that the limitations period violates plaintiffs' due process rights.

First, to the extent that plaintiffs are asking for special treatment simply because they are Indians, that special treatment may not be afforded them. Courts have routinely subjected Indians' claims to statutes of limitations. *See*, *e.g.*, *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986); *Menominee Tribe v. United States*, 726 F.2d 718, 720 (Fed.Cir.), *cert. denied*, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984); *Hydaburg Cooperative Ass'n v. United States*, 667 F.2d 64, 229 Ct.Cl. 250 (1981); *cert. denied*, 459 U.S. 905, 103 S.Ct. 207, 74 L.Ed.2d 166 (1982); *Andrade v. United States*, 485 F.2d 660, 664, 202 Ct.Cl. 988 (1973) (per curiam).

Nor can plaintiffs argue that the limitations period is unreasonable because of the government's trust obligations, as statutes of limitations apply regardless of the existence of an Indian trust. *Menominee Tribe v. United States*, 726 F.2d at 721-22; *Andrade v. United States*, 485 F.2d 660, 661, 202 Ct.Cl. 988 (1973), *cert. denied*, 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974). Similarly, the fact that the allotments were held in trust neither makes plaintiffs' claims unknowable nor suggests that

plaintiffs could not have sought advice during the past half-century about the nature of their claims.[7] Any dependence on the Bureau of Indian Affairs or reliance on the government's trust obligations may excuse plaintiffs from an accusation of *laches* but it does not necessarily exempt them from, or render unreasonable, a statute of limitations that imposes a time limit on their ability to bring suit. *See Hydaburg Cooperative Association v. United States*, 667 F.2d 64, 69-70 (1980), *cert. denied*, 459 U.S. 905, 103 S.Ct. 207, 74 L.Ed.2d 166 (1982); *Capoeman v. United States*, 440 F.2d 1002, 194 Ct.Cl. 664 (1971) (en banc). As such, the Court cannot find that the existence of a trust relationship necessarily makes the White Earth Act's statute of limitations unreasonable. *See, e.g., Menominee Tribe v. United States*, 726 F.2d at 721-22; *Fort Mojave Tribe v. United States*, 546 F.2d 429, 210 Ct.Cl. 727, 728 (1976); *Capoeman v. United States*, 440 F.2d 1002, 194 Ct.Cl. 664 (1971).

To the extent that plaintiffs argue that their unfortunate socioeconomic circumstances make it inherently unreasonable for them to bring suit within the Act's statute of limitations, that argument too cannot withstand scrutiny. Poverty and lack of education have never been deemed sufficient to render a statute of limitations unreasonable under the due process clause.[8]

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7 Indeed, the record shows that certain members of the White Earth Band sought and obtained information about their land allotments. *Shulstad Affidavit, Cobe Affidavit.*

8 Statutes of limitations, for instance, apply to suits brought *in forma pauperis. See, e.g., Lyons v. Goodson*, 787 F.2d 411 (8th Cir.1986); *Coulibaly v. T.G.I. Friday's, Inc.*, 623 F.Supp. 860, 861 (S.D.Ind.1985); *Ortiz v. Hackett*, 581 F.Supp. 1258, 1260 (N.D.Ind.1984). Statutes of limitations are, however, tolled in cases of incompetency (*see, e.g.*, 55 C.J.S. *Limitations of Actions* § 243 (1948 and Supp. 1987), where the plaintiff's claim was "unknown and inherently unknowable even in retrospect," *Urie v. Thompson*, 337 U.S. 163, 169, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282 (1949) (silicosis), or where defendants fraudulently concealed a claim that a plaintiff could not have discovered by the exercise of reasonable diligence, *e.g., Logan v. Zimmerman Brush*, 455 U.S. 422, 434-35 (1982); *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879); *Hohri v. United States*, 782 F.2d 227, 246 (D.C.Cir.1986), *vacated on other grounds*, _____ U.S. _____, 107 S.Ct.

Moreover, in light of the fact that plaintiffs' families have had a claim to these allotments for generations, *Morrow v. United States*, 243 F. 854 (8th Cir.1917), the Court cannot find that plaintiffs' unfortunate circumstances sufficiently remove the new limitation on land claim suits from the realm of the reasonable. *See, e.g., Wilson v. Iseminger*, 185 U.S. 55, 62, 22 S.Ct. 573, 575, 46 L.Ed. 804 (1902) (courts not bound to remain open indefinitely to litigants who do not apply for redress).

Plaintiffs may be suggesting that their poverty and lack of education have combined with their reliance on the government's promise to perform its trust duties and have lulled them into relying on the government to protect their interests. Thus, plaintiffs may be suggesting that the Court should find that, while no one factor renders the statute of limitations unreasonable, the *combination* of problems makes it unreasonable.

Although the Court recognizes that the plaintiffs' difficulties may combine synergistically and equal far more than the sum of their parts, this argument cannot stand. Plaintiffs have had more than fifty years in which to investigate and sue for their allotments. Regardless of their education, financial resources or the lack thereof, and their trust relationship with the government, plaintiffs are charged with knowledge of their affairs and their rights at law. *See, e.g., Menominee Tribe v. United States*, 726 F.2d 718 (Fed.Cir.), *cert. denied*, 459 U.S. 905, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984); *Hydaburg Cooperative Association v. United States*, 667 F.2d at 69-70; *Braude v. United States*, 585 F.2d 1049, 1054, 218 Ct.Cl. 270 (1978). Given this principle, the Court must find the statute of limitations a valid and reasonable exercise of congressional power that does not violate plaintiffs' due process rights.

2246, 96 L.Ed.2d 51 (1987). While tolling principles are largely irrelevant to plaintiffs' claims, the last-mentioned doctrine suggests that mere ignorance of their claims does not excuse plaintiffs' failure to bring suit on the allotments issued to their forebears. Similarly it suggests that the newly imposed statute of limitations is not unconstitutional simply because plaintiffs were allegedly not well informed of the new rule.

B. The election-of-remedies provisions do not unconstitutionally burden plaintiffs' access to courts.

Plaintiffs also argue that the White Earth Act violates their constitutional right to access to courts by forcing them to forgo the statutorily set compensation mechanism if they elect to bring a land title suit. There is little merit to this argument.

Litigants have a due process right of access to courts *if* litigation offers the only effective means, if not the exclusive means, of resolving the dispute at hand. *United States v. Kras*, 409 U.S. 434, 445, 93 S.Ct. 631, 637-38, 34 L.Ed.2d 626 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 374-78, 91 S.Ct. 780, 784-86, 28 L.Ed.2d 113 (1971). Once the state has made "access to the courts an entitlement or a necessity," it must afford that access "unless the balance of state and private interests favors the government scheme." *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 n. 5, 102 S.Ct. 1148, 1154-55 n. 5, 71 L.Ed.2d 265 (1982).

The existence of the statute's compensation scheme itself belies any argument that plaintiffs' claims could be resolved only through litigation. The statute forces plaintiffs to choose between bringing suit for their land and seeking monetary compensation in exchange for extinguishing title or other rights to the land itself. This alternative clearly demonstrates that the courts are neither the exclusive nor the only effective means through which plaintiffs may seek redress. As such, the Court finds that the statute does not impermissibly interfere with any constitutionally protected right of access to courts.

C. Plaintiffs received adequate notice of the White Earth Act.

Plaintiffs assert that due process requires the federal government to provide them with "sufficient information to have a reasonable opportunity to sue on their land claims" before the White Earth Act statute of limitations runs. *Plaintiffs' Memorandum of Points and Authorities in Support of Summary Judgment*, at 25. As such, they argue, the notice provided by defendants was insufficiently detailed and therefore constitutionally inadequate.

Plaintiffs base this argument on a line of cases establishing requirements for notice when property or a property interest is

about to be seized. *See id.* at 26 (*citing Mennonite Board of Missions v. Adams*, 426 U.S. 791, 91 S.Ct. 780, 28 L.Ed.2d 113 (1983) (notice before seizure of property for non-payment of taxes); *Memphis Gas, Light & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (notice prior to shut-off of utility services); *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956) (notice to incompetent before property seizure); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (notice to trust beneficiaries). These cases, which pertain to notice in the context of adjudicatory hearings, are irrelevant to claims of improper notice of *a statute* and its effects. *See Texaco v. Short*, 454 U.S. 516, 535-36, 102 S.Ct. 781, 795-96, 70 L.Ed.2d 738 (1982); *Brown v. McGarr*, 774 F.2d 777, 785 (7th Cir.1985).

Plaintiffs conflate two claims in their notice argument. First, they argue that they did not receive proper notice of the White Earth Act and its effects. But this claim rings hollow, as the White Earth Band actively fought the congressional proposals that became the White Earth Act. *See, e.g., White Earth Indian Land Claims Settlement: Hearings on S. 1396 before the Senate Select Committee on Indian Affairs*, 99th Cong., 1st Sess. 155-71, 187-201, 231-32 (1985). Plaintiffs cannot plead ignorance of facts with which they are well acquainted.

Even if plaintiffs had not participated, and lost, in the legislative debate, their claim of inadequate notice could not prevail. All persons, regardless of resources, are presumptively charged with knowledge of the law. *Atkins v. Parker*, 472 U.S. 115, 130, 105 S.Ct. 2520, 2530, 86 L.Ed.2d 81 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925). As long as plaintiffs were afforded a reasonable opportunity to familiarize themselves and comply with the new law, publication of the statute amounted to the notice required by the due process clause. *Texaco v. Short*, 454 U.S. 516, 531-32, 102 S.Ct. 781, 793-94, 70 L.Ed.2d 738 (1982). As the Seventh Circuit noted in *Brown v. McGarr*, 774 F.2d 777 (1985),

> [w]hen individual interests are adversely affected by a legislation action, publication of the statute puts all individ-

> uals on notice of a change in the law . . . ; individual notice is not required. . . .

Id. at 785.

Moreover, all persons are charged with knowledge of events that receive widespread publicity. *See United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980) (per curiam); *Smith v. Nixon*, 606 F.2d 1183, 1190 n. 42 (D.C.Cir.1979), *cert. denied*, 453 U.S. 912, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981) (*quoting Lee v. Kelley*, No. 76-1185, slip op. at 3 (D.D.C. Jan. 31, 1977). As the facts demonstrate that the White Earth Act was the subject of numerous news reports and great public debate in Minnesota, *see* Cobe Affidavit, Exhibit 19, plaintiffs must be deemed to have been on sufficient notice of the change in the law.[9]

No court has ever found that property owners have a due process right to notice of precisely how their property right would be affected by a statute. "It has never been suggested that each owner must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Texaco v. Short*, 454 U.S. at 536, 102 S.Ct. at 795-96. Nor has it been suggested that a property owner must be given full information about his or her property rights before those rights may be affected by a new law. While plaintiffs are unlike other property owners to the extent that they are not responsible for the day-to-day management of properties held in trust for them, *see United States v. Mitchell*, 463 U.S. 206, 227, 103 S.Ct. 2961, 2973, 77 L.Ed.2d 580 (1983), they cannot be deemed ignorant of the fact that they have some rights as heirs to a land allotment. *See Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir.1982); *Braude v. United States*, 585 F.2d 1049, 1054, 218 Ct.Cl. 270 (1978).

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9 Plaintiffs' claims of inadequate notice are particularly inappropriate for another reason. Defendants did not simply rely on publication and publicity but actually attempted to communicate news of and information about the White Earth Act to all affected parties. *See* Cobe Affidavit, Exhibits 5, 7, 9, 10, 15-17. As such, at least some members of the plaintiff class received more than the minimally required notice of the new law.

Plaintiffs also appear to argue that, in view of their lack of resources and little information about their land claims, due process requires defendants to provide plaintiffs with enough information to sue on their land claims before the statute of limitations is permitted to run. Undergirding this argument are separate lines of reasoning, neither of which is supported by the law.

As an initial matter, this notice argument rests in part on the alleged unconstitutionality of the statute of limitations. Plaintiffs argue that they are entitled to all the information gathered by the government as part of its trust duties to plaintiffs before the statute of limitations runs. But, as the statute of limitations may run despite plaintiffs' alleged reliance on the Bureau of Indian Affairs and despite any trust obligations of the federal government, *see, e.g., Hydaburg Cooperative Association v. United States*, 667 F.2d 64, 69-70, 229 Ct.Cl. 250 (1981), *cert. denied*, 459 U.S. 905, 103 S.Ct. 207, 74 L.Ed.2d 166 (1982), plaintiffs' argument is unsupported by law.

The other flaw in plaintiffs' notice argument is the unstated assumption that plaintiffs must have full information about their claims before they can bring suit. Nothing prevents a plaintiff from bringing suit with far less than full information about his or her claim. *See Braude v. United States*, 585 F.2d 1049, 1054, 218 Ct.Cl. 270 (1978). As such, plaintiffs have no legitimate due process challenge to allowing the statute of limitations to run before they receive full information about their individual allotments and claims.

In sum, the Court finds that the White Earth Act statute of limitations does not violate plaintiffs' rights under the due process clause. Nor are plaintiffs' due process rights violated by the election-of-remedies provisions or the notice provided to plaintiffs. The Court must now consider plaintiffs' other set of constitutional challenges to the White Earth Act.

THE WHITE EARTH ACT DOES NOT TAKE PLAINTIFFS' PROPERTY WITHOUT JUST COMPENSATION

Plaintiffs argue that the White Earth Act takes their property and fails to provide them with just compensation, in violation of the Fifth Amendment. Plaintiffs do not, however, clearly state *what* property was taken and when the taking occurred.

Plaintiffs appear to claim that the White Earth Act takes their interest in allotments on the White Earth Reservation without just compensation. *But see Plaintiffs' Memorandum in Support of Summary Judgment*, at 35 n. 72. But, as plaintiffs would be the first to admit, few of plaintiffs' land claims have been tested in court. Thus, if the Act effects a taking of plaintiffs' property, the property taken is either plaintiffs' cause of action to perfect their land claims, plaintiffs' interest in allotments as determined by the Secretary of the Interior pursuant to § 7 of the Act, or plaintiffs' property right to a known allotment or fractional interest in a known allotment. However the taking is defined, plaintiffs' rights have been safeguarded.

A. The White Earth Act does not take plaintiffs' right to sue for determination of their land claims without just compensation.

Plaintiffs have neither an arguable claim that their right to bring a land claims suit was "taken" by the statute nor an arguable right to compensation for the "loss" of that right. As detailed above, the White Earth Act merely creates a reasonable, if short, statute of limitations for bringing suit to recover properties covered by the Act. There is no taking, and no constitutional right to compensation, when a new statute of limitations is imposed as long as those affected are afforded a reasonable opportunity to bring suit. *See Texaco v. Short*, 454 U.S. 516, 531-32, 102 S.Ct. 781, 793-94, 70 L.Ed.2d 738 (1982); *Block v. North Dakota*, 461 U.S. 273, 286 n. 23, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983); *Keller v. Dravo Corp.*, 441 F.2d 1239, 1242 (5th Cir.1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972).

B. The White Earth Act does not take plaintiffs' interests in land without just compensation.

Nor can plaintiffs successfully claim that the White Earth Act fails to provide just compensation for the taking of plaintiffs' interests in land. The Act extinguishes plaintiffs' claims to land on the White Earth Reservation in exchange for compensation at

> the fair market value of the land interest . . . as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer . . . less any compensation actually received, plus interest compounded annually at 5 per centum from the date of said loss of an allotment or interest until the date of enactment of this Act, and at the general rate of interest earned by United States Department of the Interior funds thereafter.

Pub.L. 99-264, § 8(a).[10]

It is not clear whether plaintiffs claim that their property was taken when the individual allotments were improperly alienated or by the White Earth Act itself. There is some authority for the proposition that the taking occurred when the allotments were alienated and the government, as trustee for the allottees, permitted the disposals to stand. *See United States v. Creek Nation*, 295 U.S. 103, 110-111, 55 S.Ct. 681, 684-85, 79 L.Ed. 1331 (1935). Moreover, this is the most sensible interpretation in light of the language of the statute itself. Accordingly, the Court will assume that plaintiffs seek compensation for a taking that occurred whenever the allotments in which plaintiffs have an interest were sold, mortgaged, forfeited for taxes, or otherwise improperly alienated from plaintiffs or their ancestors.

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10 The Act also provides that the fair market value of allotments sold or mortgaged by minors or in a fraudulent transaction shall not be reduced by compensation actually received when the land was alienated from the allottee or heir. Pub.L. 99-264, § 7(a). The Act goes on to prohibit compensation for loss of an allotment or interest later determined by the Secretary of the Interior to have been improperly received in a State probate court proceeding. *Id.*

The plaintiffs, as owners of at least fractional interests in these allotments,[11] are entitled to compensation at the fair market value of the land at the time of the taking, plus an amount sufficient "to produce the present full equivalent" of that value. *Id.* at 111, 55 S.Ct. at 684-85; *Antoine v. United States*, 710 F.2d 477, 479-80 (8th Cir.1983). Interest at a "reasonable rate" is an appropriate measure for determination of the amount to be added. *Id.* at 480.

Although the White Earth Act obviously attempts to compensate allottees with the present-day equivalent of their lost allotments, plaintiffs maintain that the amount of compensation provided is not the constitutionally required "just compensation." They further maintain that Congress intended the compensation to fall short of the constitutional mandate. Whether plaintiffs are correct or not, this allegedly intentional inadequacy does not offend the Constitution.

A party may, pursuant to the Tucker Act, 28 U.S.C. § 1491, usually bring suit in the United States Claims Court to challenge the constitutional adequacy of compensation paid when the federal government takes his or her property.[12] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17, 104 S.Ct. 2862, 2879-80, 81 L.Ed.2d 815 (184); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-27, 95 S.Ct. 335, 349-50, 42 L.Ed.2d 320 (1974). Only if Congress expressly

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11 Defendants argue that plaintiffs' ownership rights are speculative, as no court has determined actual ownership of each allotment and plaintiffs' only "right" is the right to bring suit to determine their ownership claims. While this may reflect plaintiffs' current status, it may be that individuals eligible for compensation under the Act will have had their property rights determined by the Secretary of the Interior. *See* Pub.L. 99-264, § 7.

12 The Tucker Act, codified at 28 U.S.C. § 1491, provides in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

withdraws Tucker Act jurisdiction over that category of takings is redress in the Claims Court unavailable. *Regional Rail Reorganization Cases*, 419 U.S. at 126-27, 95 S.Ct. at 349-50. As the White Earth Act explicitly permits compensation recipients to challenge the amount of compensation in a Tucker Act suit, Pub.L. 99-264, § 6(d), any White Earth Act claimant may challenge the statutory level of compensation in a suit in the Claims Court.

Thus, plaintiffs' ability to obtain just compensation does not "depend solely on the validity of the statutory compensation scheme," *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 (1984), but also on the availability of the Tucker Act remedy. Nonetheless, and regardless of the lack of ripeness of any individual claim of unjust compensation, plaintiffs maintain that the Tucker Act remedy is constitutionally inadequate as it applies to all who seek compensation under the White Earth Act.

First, plaintiffs attack the validity of the Tucker Act remedy itself. They argue that the Claims Court lacks jurisdiction to determine any claims of unjust compensation and therefore the Tucker Act remedy cannot constitutionally remedy their takings claims. Plaintiffs base their argument on *Northern Pipeline Co. v. Marathon Oil*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), and its progeny, which mandate that only courts established pursuant to Article III determine constitutional questions.

This line of reasoning misconstrues the nature of a Tucker Act suit. Such a suit does not challenge the constitutionality of an uncompensated taking but seeks an adjustment in the remedy for the taking of property. As a party may appeal from the Claims Court to an Article III Court, there is no possible constitutional violation. *See, e.g., Ingalls Shipbuilding v. United States*, 13 Cl.Ct. 757, 762 (1987). Most likely for that very reason, the Supreme Court has sanctioned resort to the Claims Court for compensation claims even after *Marathon Oil. See, e.g., Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 593 n. 4, 105 S.Ct. 3325, 3339 n. 4, 87 L.Ed.2d 409 (1985);

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017-19, 104 S.Ct. 2862, 2880-81, 81 L.Ed.2d 815 (1984).[13]

Plaintiffs also assert that the Tucker Act remedy, even if constitutionally adequate in some cases, cannot constitutionally remedy the inadequate compensation available under the White Earth Act. They maintain that Congress deliberately provided inadequate compensation for the takings under the White Earth Act and that the possibility of a remedy under the Tucker Act cannot shield this intentionally unconstitutional compensation scheme.

In the *Regional Rail Reorganization Act Cases*, the Supreme Court noted that the Tucker Act remedy is sufficient at least when a statute's "basic compensation scheme . . . is valid but could result in payment of less than the constitutional minimum." 419 U.S. at 150, 95 S.Ct. at 362. This is precisely the situation plaintiffs face under the White Earth Act.

Plaintiffs who have legitimate land claims are entitled to the value of their property at the time of the taking plus a "reasonable rate" of interest sufficient to compensate for the delay in payment by producing "the present full equivalent of that value [which should have been] paid contemporaneously with the taking." *United States v. Creek Nation*, 295 U.S. 103, 111, 55 S.Ct. 681, 684-85, 79 L.Ed. 1331 (1935); *Antoine v. United States*, 710 F.2d 477, 479-80 (8th Cir. 1983). The White Earth Act would provide these plaintiffs with the fair market value of the land at the time of the taking, plus 5 percent compounded interest from that date through the date on which the statute was enacted, plus the rate of interest paid on Department of Interior funds from the enactment date through the date on which the award was paid. The Court must conclude that this scheme is a good faith effort to compensate plaintiffs fairly,

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13 As plaintiffs suing under the Tucker Act for a remedy in an Article I court with a right of appeal to an Article III court, their position is analogous to litigants who proceed before administrative tribunals or United States Magistrates with a right of appeal to an Article III judge. As the Supreme Court has noted, "many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593, 105 S.Ct. 3325, 3339-40, 87 L.Ed.2d 409 (1985).

which, in light of the availability of a Tucker Act suit, is all that the law requires. *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 389, 408-09, 100 S.Ct. 2716, 2727-28, 2737-38, 65 L.Ed.2d 844 (1980).

The 5 per cent compounded rate of interest may not precisely reflect the average prevailing rates of interest throughout the period in which plaintiffs were deprived of their land.[14] This does not render the compensation scheme invalid. Because statutorily set rates of "interest with respect to a deficiency"—the rates at issue here—are a floor on compensation that the Claims Court can, if necessary, exceed, this proximity meets the requirements of the Constitution. *See, e.g., Miller v. United States*, 620 F.2d 812, 837-40, 223 Ct.Cl. 352 (1980); *United States v. Blankinship*, 543 F.2d 1272, 1275-76 (9th Cir.1976); *see also, e.g., Schor v. Commodities Futures Trading Commission*, 740 F.2d 1262, 1287 (D.C.Cir.1984), *rev'd on other grounds*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (court must interpret legislation as if constitutional).

Finally, plaintiffs argue that the White Earth Act so limits their ability to bring a Tucker Act suit that it transforms the Tucker Act from a "safety net" to a "delusive remedy." In particular, plaintiffs take issue with the White Earth Act's mandate that Tucker Act suits must be brought within six months after administrative determinations of compensation due to the allottee. The Court is not convinced that this statute of limitations disadvantages plaintiffs at all.

Ordinarily, any claim under the Tucker Act must be brought "within six years after such claim first accrues." 28 U.S.C. § 2501. This statute, like its predecessor (which was identical in all pertinent respects), has been interpreted to mean that a Tucker Act suit will be barred unless brought within six years *of*

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14 In *Pitcairn v. United States*, 547 F.2d 1106, 212 Ct.Cl. 168 (1976) (en banc) (per curiam), *cert. denied*, 434 U.S. 1051, 98 S.Ct. 903, 54 L.Ed.2d 804 (1978), the Court of Claims documented the rates of interest prevailing during much of the past half-century. According to *Pitcairn*, a "reasonable rate" of interest to compensate takings of property would have been 6 percent for the period 1927-37, 5 percent for 1937-44, 4 percent for 1944-55, 4½ percent for 1956-60, 4¾ percent for 1961-65, 6½ percent for 1966-70; and 7½ percent for 1971-75. *Id.* at 1120-21. The prime rate, however, was lower than these rates for much of this period. *Id.* at 1124.

the date on which the property at issue was taken or the date on which the owner had constructive notice of the taking. See, e.g., Mitchell v. United States, 10 Cl.Ct. 63, *modified in part on other grounds*, 10 Cl.Ct. 787 (1986) (date of constructive notice); *Bellamy v. United States*, 7 Cl.Ct. 720 (1985); *Pete v. United States*, 531 F.2d 1018, 209 Ct.Cl. 270 (1976) (per curiam); *Steel Import & Forge Co. v. United States*, 355 F.2d 627, 174 Ct.Cl. 24 (1966). As the White Earth Act's six-month statute of limitations on Tucker Act suits runs from the date on which the allottee is notified of an administrative determination of the amount of compensation to which he or she is entitled—a date almost certainly more than six years after the taking or constructive notice of the taking—the Act, if anything, extends the time available for Tucker Act suits.

The Court recognizes the possibility, however unlikely, that some plaintiffs may be able to show that they never had constructive notice of the taking of land until they were notified that they were allottees affected by the Act. These plaintiffs might well be afforded less time in which to sue than other Tucker Act litigants. This does not render the six-month statute of limitations invalid.

As discussed in detail above, a statute of limitations is valid as long as it offers a litigant with an existing cause of action a reasonable period in which to sue. *See, e.g., Texaco v. Short*, 454 U.S. 516, 527 n. 21, 102 S.Ct. 781, 791 n. 21, 70 L.Ed.2d 738 (1982) (*quoting Wilson v. Iseminger*, 185 U.S. 55, 62-63, 22 S.Ct. 573, 575-76, 46 L.Ed. 804 (1902)). Unless the time granted is so short that it would result in a miscarriage of justice, a Court cannot second-guess Congress's determination of the reasonableness of a time bar. *Wilson v. Iseminger*, 185 U.S. at 62-63, 22 S.Ct. at 575-76. The Court cannot fault Congress's judgment that White Earth claimants could reasonably bring suit for just compensation within six months after receiving an administrative determination of the amount of compensation to which they are entitled.

These six months follow a long period of time in which allottees could have discovered information about their land claims. Moreover, the six-month period will begin to run only after the Secretary of the Interior undertakes the substantial administra-

tive proceedings demanded by the White Earth Act and develops a factual record about each allotment that will enable an allottee to bring suit far more speedily than the ordinary Tucker Act litigant. *See* White Earth Act, § 7. As such, the Court cannot find that the six-month time bar is designed to defeat the Tucker Act remedy or would otherwise result in injustice to White Earth Act claimants. *See, e.g., Edwards v. Kearzey*, 96 U.S. (6 Otto) 595, 603, 24 L.Ed. 793 (1878); *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 24 L.Ed. 365 (1877).

Finally, plaintiffs assert that, as other Tucker Act litigants have six years in which to sue, the White Earth Act's six-month statute of limitations deprives plaintiffs of equal protection of the laws. Plaintiffs are not correct.

First, as it is far from clear that plaintiffs are harmed by the six-month limitations period, whether plaintiffs have any claim under the equal protection clause is uncertain. *See generally* L. Tribe *American Constitutional Law* 1436-39 (1982). Assuming *arguendo* that the six-month time bar would force at least one member of the plaintiff class to bring a Tucker Act suit less than six years after actual or constructive notice of the taking of his or her property, that alone does not compel a finding of denial of equal protection.

The statute of limitations must be sustained against an equal protection challenge "if the classifications it employs 'rationally further the purpose identified' by the federal government." *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 500, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (*quoting Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976)).[15] There can be little

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15 Plaintiffs did not address what level of scrutiny the Court should apply to their equal protection claim. While it is possible that "strict scrutiny" may be the appropriate analytical tool for cases that make explicit, race-based distinctions "directed at the persons of American Indians," L. Tribe, *American Constitutional Law* 1472 (1982), it is not appropriate for cases involving distinctions arising out of the law's view of American Indians as a distinct *political* group. *See, e.g., Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761-62, 58 L.Ed.2d 740; *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84, 41 L.Ed. 290

doubt that the White Earth Act's statute of limitations furthers the statute's stated goals of ending the uncertainties surrounding the White Earth claims expeditiously and allowing claimants a reasonable period of time in which to challenge the compensation determination. *See* Pub.L. 99-264, § 2. As such, the Court cannot find that the Tucker Act statute of limitations violates the equal protection clause.

THE COURT CANNOT GRANT THE ALTERNATIVE RELIEF REQUESTED BY PLAINTIFFS.

Plaintiffs do not simply ask for a finding that the White Earth Act is unconstitutional. In the alternative, they ask the Court, if it upholds the Act, to find that defendants violated their trust duties by failing to make heirship determinations and to provide legal assistance sufficient to allow the heirs to bring suit to recover their land. They also ask the Court to order defendants to perform those duties and to enjoin the Secretary from publishing certification that the enumerated conditions have been met (thus tolling the statute of limitations) before those trust duties are carried out.

Even assuming *arguendo* that defendants have failed to perform "trust duties,"[16] the Court cannot grant the requested relief. Because plaintiffs seek to compel the Secretary of Interior to perform a duty owed them, the Court must treat their request as a petition for a writ of mandamus. 28 U.S.C. § 1361;

(1974). As land claims cases fall within that category, and as the White Earth Act is facially neutral, the Court will not employ the strict scrutiny test in this case.

16 The Court is not convinced by defendants' arguments against the idea that the "obligations" outlined by plaintiffs constitute "trust duties." The General Allotment Act, and subsequent acts authorizing particular allotments, imposed on the federal government a trust duty to prevent the improvident alienation of allotted land. *United States v. Mitchell*, 445 U.S. 535, 544 & n. 5, 100 S.Ct. 1349, 1354-55 n. 5, 63 L.Ed.2d 607 (1980). Consequently, plaintiffs arguments have more force than may at first appear. Nonetheless, whether these obligations are properly termed "trust duties" is ultimately irrelevant to a decision in this case.

see also 13th Regional Corp. v. United States Department of Interior, 654 F.2d 758, 760 (D.C.Cir.1980).

Mandamus will issue " 'only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.' " *Id.* (*quoting United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420, 51 S.Ct. 502, 504, 75 L.Ed. 1148 (1931)). The question is largely one of congressional intent: "If Congress had an intent with respect to the question at issue and if that intent was to create a mandatory, nondiscretionary duty on the part of the official(s) charged with administering the [duty], then mandamus is appropriate (if no other remedy is adequate)." *American Cetacean Society v. Baldrige*, 768 F.2d 426, 434 (D.C.Cir. 1985), *rev'd on other grounds sub nom. Japan Whaling Association v. Baldrige*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986).

Neither a specific ministerial duty nor a congressional intent to create such a duty marks this case. Rather, plaintiffs seek to compel defendants to exercise their discretion with respect to their trust duties *in a particular manner*. Mandamus cannot compel this. *See, e.g., Panama Canal Co. v. Grace Line*, 356 U.S. 309, 317-18, 78 S.Ct. 752, 757-58, 2 L.Ed.2d 788 (1958). Moreover, Congress has, if anything, rejected plaintiffs' position by tabling an amendment that would have obligated the government to provide certain plaintiffs with full information about their land claims. 131 Cong.Rec. S17586 (daily ed. Dec. 13, 1985). In light of these facts, the Court would gravely abuse its discretion if it ordered the alternative relief sought by plaintiffs.

CONCLUSION

The history of our treatment of Native Americans is made no less tragic by the passage of time. The ancestors of the plaintiffs in this case ceded their vast territory in exchange for a promise that some of that land would one day be theirs; what plaintiffs want, at base, is to have that promise made real.

That plaintiffs have the Court's full sympathy should be clear. But they have come to a court, not a legislature, and the Court's sympathies cannot be placed above the law's command. Accordingly, the Court must find the White Earth Act constitutional and must deny plaintiffs the alternative relief they seek. As such, plaintiffs are entitled neither to a preliminary injunction nor to summary judgment. Plaintiffs have, however, also moved for class certification, and the Court must grant that motion, as plaintiffs are entitled to be certified as a class.

The Court will enter summary judgment in favor of defendants and defendant-intervenors and will deny plaintiffs' motions for preliminary injunctive relief and summary judgment. The Court will issue an Order, of even date herewith, memorializing these decisions.

APPENDIX C

PUBLIC LAW 99-264 [S. 1396]; March 24, 1986

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985

An Act to settle unresolved claims relating to certain allotted Indian lands on the White Earth Indian Reservation, to remove clouds from the titles to certain lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "White Earth Reservation Land Settlement Act of 1985".

SEC 2. The Congress finds that—

(1) claims on behalf of Indian allottees or heirs and the White Earth Band involving substantial amounts of land within the White Earth Indian Reservation in Minnesota are the subject of existing and potential lawsuits involving many and diverse interests in Minnesota, and are creating great hardship and uncertainty for government, Indian communities, and non-Indian communities;

(2) the lawsuits and uncertainty will result in great expense and expenditure of time, and could have a profound negative impact on the social and well-being of everyone on the reservation;

(3) the White Earth Band of Chippewa Indians, State of Minnesota, along with its political subdivisions, and other interested parties have made diligent efforts to fashion a settlement to these claims, and the Federal Government, by providing the assistance specified in this Act, will make possible the implementation of a permanent settlement with regard to these claims;

(4) past United States laws and policies have contributed to the uncertainty surrounding the claims;

(5) it is in the long-term interest of the United States, State of Minnesota, White Earth Band, Indians, and non-Indians for the United States to assist in the implementation of a fair and equitable settlement of these claims; and

(6) this Act will settle unresolved legal uncertainties relating to these claims.

SEC. 4. (a) The provisions of this Act shall apply to the following allotments:

(1) allotments which were never sold or mortgaged by the allottees or by their heirs and which were tax forfeited during the trust period;

(2) allotments which were sold or mortgaged during the trust period, without the approval of the Secretary, by the allottees prior to having attained majority, and were never again sold or mortgaged either by the allottees upon their having attained majority or by heirs of the allottees;

(3) allotments which were sold or mortgaged during the trust period by full blood allottees without the approval of the Secretary, and were never again the subject of a sale or mortgage by heirs of the allottees; and

(4) allotments which were never sold or mortgaged by the allottees, but which subsequent to the deaths of the allottees, purportedly were sold or mortgaged, during the trust period, by administrators, executors, or representatives, operating under authority from State courts, and were never again the subject of a sale or mortgage by heirs of the allottees.

(b) The provisions of this Act shall also apply to the following allotments or interests in allotments:

(1) allotments or interests which were inherited by full or mixed bloods who never sold or mortgaged their allotments or interests or by Indians enrolled in other federally recognized Indian tribes, bands, or communities who never sold or mortgaged their allotments or interests,

where the allotments or interests were tax forfeited during the trust period;

(2) allotments or interests which were inherited by mixed bloods under the age of majority and which were sold or mortgaged during the trust period without the approval of the Secretary prior to such mixed bloods having attained majority, but which were never again sold or mortgaged by them upon having attained majority or by their heirs;

(3) allotments or interests which were inherited by full bloods or by Indians enrolled in other federally recognized Indian tribes, bands, or communities, who sold or mortgaged such allotments or interests during the trust period without the approval of the Secretary;

(4) allotments or interests which were inherited by full or mixed bloods who never sold or mortgaged their allotments or interests, but which, subsequent to the deaths of such heirs, were sold or mortgaged during the trust period by administrators, operating under authority from State courts;

(5) allotments or interests which were owned by allottees or which were inherited by full or mixed bloods for whom guardians were appointed by State courts, which guardians sold or mortgaged the allotments or interests during the trust period without the approval of the Secretary;

(6) interests which were inherited by full or mixed bloods who never sold or mortgaged their interests during the trust period, even though other interests in the same allotment were sold by other heirs where the land comprising the allotment has been claimed in full by other parties adversely to the full or mixed bloods who never sold or mortgaged their interests; and

(7) allotments or interests which were inherited by full or mixed bloods or by Indians enrolled in other federally recognized Indian tribes, bands, or communities which were never sold or mortgaged during the trust period but

which were purportedly distributed by State court probate proceedings to other individuals.

SEC. 5. (c) As to any allotment which was granted to an allottee who had died prior to the selection date of the allotment, the granting of such allotment is hereby ratified and confirmed, and shall be of the same effect as if the allotment had been selected by the allottee before the allottee's death: *Provided*, That the White Earth Band of Chippewa Indians shall be compensated for such allotments in the manner provided in sections 6, 7, and 8.

SEC. 6. (a) As soon as the conditions set forth in section 10 of this Act have been met, the Secretary shall publish a certification in the Federal Register that such conditions have been met. After such publication, any allotment or interest which the Secretary, in accordance with this Act, determines falls within the provisions of section 4(a), 4(b), or 5(c), the tax forfeiture, sale, mortgage, or other transfer, as described therein, shall be deemed to have been made in accordance with the Constitution and all laws of the United States specifically applicable to transfers of allotments or interests held by the United States in trust for Indians, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer, subject to the provisions of section 6(c). Compensation for loss of allotments or interests resulting from this approval and ratification shall be determined and processed according to the provisions of section 8.

(b) By virtue of the approval and ratification of transfers of allotments or interests therein effected by this section, all claims against the United States, the State of Minnesota or any subdivisions thereof, or any other person or entity, by the White Earth Band, its members, or by any other Indian tribe or Indian, or any successors in interest thereof, arising out of, and at the time of or subsequent to, the transfers described in section 4(a), 4(b), or 5(c) and based on any interest in or nontreaty rights involving such allotments or interests therein, shall be

deemed never to have existed as of the date of the transfer, subject to the provisions of this Act.

(c) Notwithstanding any provision of law other than the provisions of this section, any action in any court to recover title or damages relating to transactions described in section 4(a), 4(b), 5(a) or 5(c), shall be forever barred unless the complaint is filed not later than one hundred and eighty days following enactment of this Act, or prior to the publication required by section 6(a) whichever occurs later in time: *Provided*, That immediately upon the date of enactment of this Act any such action on behalf of the White Earth Band of Chippewa Indians shall be forever barred, unless the publication required by section 6(a) does not take place within two years of the date of enactment of this Act in which case the bar of any such action on behalf of the White Earth Band of Chippewa Indians shall be deemed lifted and nullified: *Provided further*, That the Secretary shall not issue to the White Earth Band any report rejecting litigation nor submit to Congress any legislation report pursuant to section 2415 of title 28, United States Code, relating to transactions described in section 4(a), 4(b), 5(a) or 5(c) of this Act, until and unless the bar against actions on behalf of the White Earth Band is lifted and nullified. Any such action filed within the time period allowed by this subsection shall not be barred; however, the filing of any such action by an allottee, heir, or others entitled to compensation under this Act shall bar such allottee, heir, or others from receiving compensation pursuant to the provisions of section 8. The United States District Court for the District of Minnesota shall have exclusive jurisdiction over any such action otherwise properly filed within the time allowed by this subsection.

(d) This section shall not bar an heir, allottee, or any other person entitled to compensation under this Act from maintaining an action, based on the transactions described in section 4(a), 4(b), 5(a), or 5(c), against the United States in the Claims Court pursuant to the Tucker Act, section 1491 of title 28, United States Code, challenging the constitutional adequacy of the compensation provisions of section 8(a) as they apply to a particular allotment or interest: *Provided*, That such action

shall be filed with the Claims Court not later than one hundred and eighty days after the issuance of the notice of the Secretary's compensation determination as provided in section 8(c). If such an action is not filed within the one-hundred-and-eighty-day period, it shall be forever barred. The United States hereby waives any sovereign immunity defense it may have to such an action but does not waive any other defenses it may have to such action. The filing of an action by any heir, allottee, or any other person under the provisions of this section shall bar such person forever from receiving compensation pursuant to the provisions of section 8.

SEC. 8. (a) Compensation for a loss of an allotment or interest shall be the fair market value of the land interest therein as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer described in section 4(a), 4(b), or 5(c), less any compensation actually received, plus interest compounded annually at 5 per centum from the date of said loss of an allotment or interest until the date of enactment of this Act, and at the general rate of interest earned by United States Department of the Interior funds thereafter. A determination of compensation actually received shall be supported by Federal, State, or local public documents filed contemporaneously with the transaction or by clear and convincing evidence. Compensation actually received shall not be subtracted from the fair market value in any instance where an allotment or interest was sold or mortgaged by a full or mixed blood, under the age of eighteen years, or in any instance where there is prima facie evidence that fraud occurred in a sale or mortgage. No compensation for loss of an allotment or interest relating to transfers described in section 4(b) shall be granted to any person or the heirs of such person where such allotment or interest was received pursuant to State court probate proceedings and where also it has been or is determined by the Secretary that such person or heirs were not entitled to inherit the allotment or interest.

(b) For the purpose of this section, the date of transfer applicable to interests described in section 4(b)(6) shall be the last date on which any interest in the subject allotment was trans-

ferred by document of record by any other heir of the allottee; and the date of transfer applicable to allotments described in section 5(c) shall be the selection date. For purposes of this section, the Secretary shall establish the fair market value of various types of land for various years, which shall govern the compensation payable under this section unless a claimant demonstrates that a particular allotment or interest had a value materially different from the value established by the Secretary.

(c) The Secretary shall provide written notice of the Secretary's compensation determination to the allottees or heirs entitled thereto. Such notice shall describe the basis for the Secretary's determination, the applicable time limits for judicial review of the determination, and the process whereby such compensation will be distributed. The Secretary shall proceed to make such heirship determinations as may be necessary to provide the notice required by this section: *Provided*, That the Secretary shall accept as conclusive evidence of heirship any determination of the courts of the State of Minnesota as provided in section 5(a) of this Act: *Provided further*, That the Secretary shall give written notice only to those allottees or heirs whose addresses can be ascertained by reasonable and diligent efforts; otherwise such notice shall be given by publication in the Federal Register.

(d) The Secretary's administrative determination of the appropriate amount of compensation computed pursuant to the provisions of this Act may be judicially reviewed pursuant to the Administrative Procedure Act not later than one hundred and eighty days after the issuance of notice as aforesaid; after such time the Secretary's determination shall be conclusive and all judicial review shall be barred. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Minnesota.

SEC. 10. (a) The provisions of section 6 of this Act shall take effect upon the publication in the Federal Register by the Secretary of certification that the following conditions have been satisfied:

(1) The State of Minnesota, in accordance with Laws of Minnesota 1984, chapter 539, has entered into an agreement with the Secretary providing for the transfer of ten thousand acres of land within the exterior boundaries of the White Earth Reservation to the United States to hold in trust for the White Earth Band of Chippewa Indians as the State's contribution to the settlement provided for by this Act. The Secretary shall not enter into such an agreement until the Secretary determines, or the authorized governing body of the band certifies to the Secretary in writing, that the agreement will result in the transfer of ten thousand acres which possess reasonable value for the White Earth Band, including but not limited to value for agricultural, recreational, forestry, commercial, residential, industrial, or general land consolidation purposes. The land transferred pursuant to this subsection shall be accepted by the United States subject to all existing accesses, roads, easements, rights of way, or similar uses unless the Governor and Attorney General of the State of Minnesota certify in writing to the Secretary the State's intent to abandon such uses on a particular parcel.

(2) The State, in accordance with the Laws of Minnesota 1984, chapter 539, has appropriated $500,000 for the purpose of providing the United States with technical and computer assistance for implementing the settlement provided for in this Act.

(3) The United States has appropriated $6,600,000 for economic development for the benefit of the White Earth Band of Chippewa Indians.

No. 89-538

IN THE

Supreme Court of the United States

October Term, 1989

EDNA EMERSON LITTLEWOLF, ET AL.,
Petitioners,

vs.

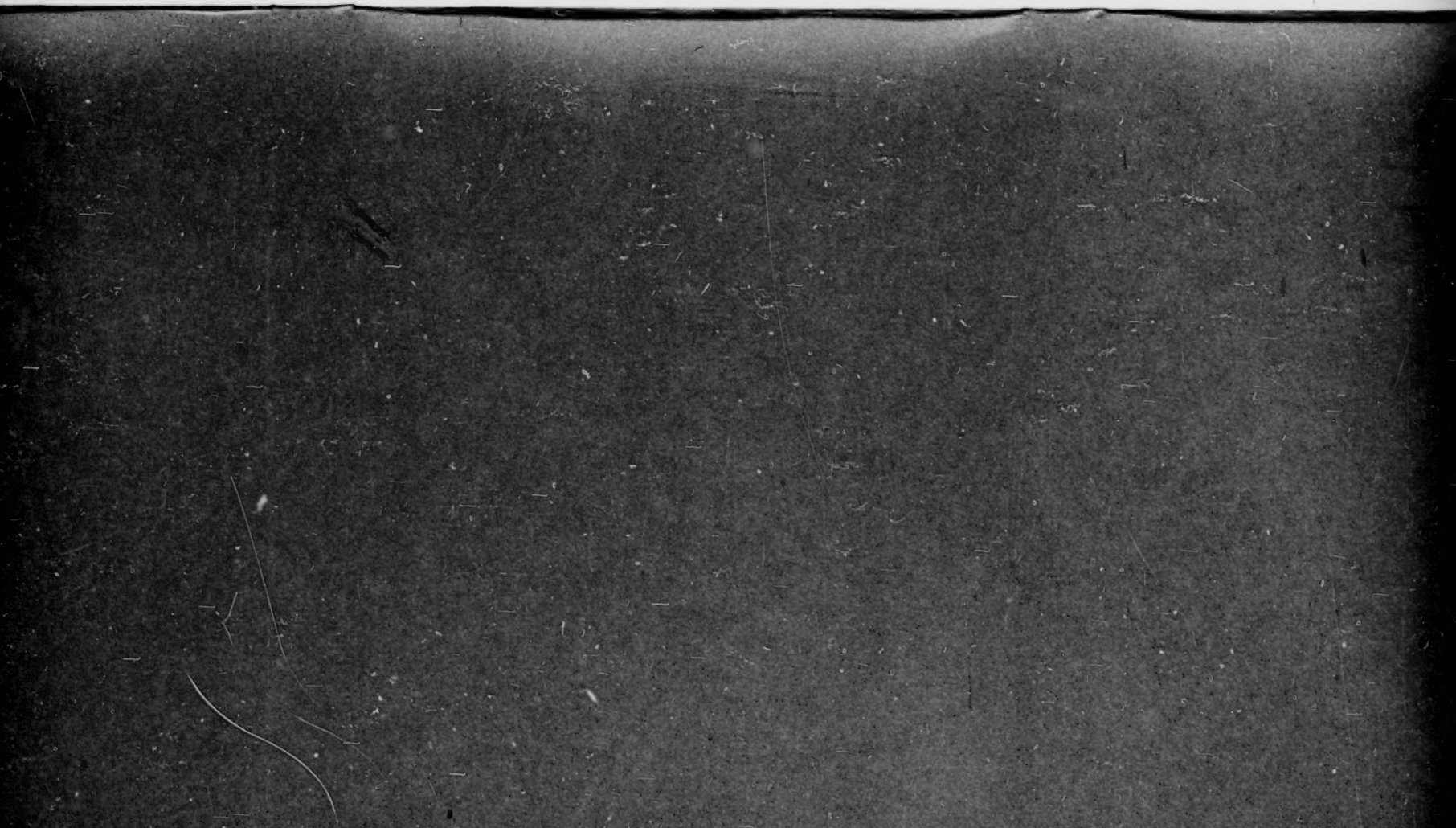
MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT STATE OF MINNESOTA IN OPPOSITION TO CERTIORARI

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Assistant Attorney General
WILLIAM A. SZOTKOWSKI
Special Assistant
Attorney General
Suite 200, 520 Lafayette Road
St. Paul, Minnesota 55155
Telephone: (612) 296-0693
Attorneys for State of Minnesota

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631



QUESTIONS PRESENTED FOR REVIEW

In 1986, Congress passed an act designed to settle a bitter and unresolved Indian land claims controversy within the White Earth Indian Reservation in Minnesota. The act cleared clouded land titles, provided a period of time within which land claims lawsuits could be brought and provided compensation to potential plaintiffs who did not bring lawsuits. The question presented is:

1. Whether this act, on its face, is within the constitutional authority of Congress to enact, or whether it violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

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STATEMENT OF THE CASE

This appeal involves a third attempt by the plaintiffs/petitioners to have the White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61, (hereinafter "WELSA") declared unconstitutional. The first two attempts, in the United States District Court for the District of Columbia and in the United States Court of Appeals for the District of Columbia Circuit, were firmly rejected by both courts without dissent. The courts below found WELSA constitutional on a number of different grounds, each independent of the other.

Minnesota takes exception to the petitioners' Statement of the Case. Petitioners' statement is filled with such highly opinionated rhetoric and conclusory legal statements as to make it little more than thinly disguised argument. Additionally, petitioners fail to mention at all most of the factors relevant to Congress' consideration and passage of WELSA. A far more objective statement of the factors underlying this controversy and Congress' reaction to it may be found in either the district court or court of appeals opinion below. Minnesota will add here a few further details that should be emphasized for a proper understanding of the issues in this case.

The details of the political, legal, and social history of the White Earth Reservation, though interesting, are of limited importance to this case. What is important, as all parties readily acknowledge, is the fact that such history is extensive, complex, and unique. It is further important to understand that the history of White Earth, and past federal statutes and policies affecting White Earth, were examined extensively in congressional hearings, testimony, and debate during the four years (including four separate extensive congressional hearings) that settlement legislation was considered by Congress.

For purposes of analyzing the current Petition for Certiorari, Minnesota suggests that the following background information is of most relevance.

1. The claims to land that gave rise to WELSA have achieved enough publicity and notoriety to make it virtually impossible for the record title holders to over 100,000 acres of land to engage in any kind of land transactions. Much of the publicity came from the local office of the Bureau of Indian Affairs, which publicized claims theories and sent letters to landowners suggesting that their land titles were not valid. Titles became clouded because of the unsettled and public nature of the controversy, not because the claims theories had been held to be legally valid.

2. The theories behind the claims involve mostly laws, policies, and land transactions that are several decades old, some going back to the late 1800's. The theories implicate the Dawes General Allotment Act of 1887 (24 Stat. 389); the Nelson Allotment Act of 1889 (25 Stat. 642); the so-called Clapp Amendments of 1906 and 1907 (34 Stat. 325 and 34 Stat. 1034); the Burke Act of 1906 (34 Stat. 182); and Executive Branch policies and legal opinions from the early 1900's relating to probates, issuance of patents, and sales of allotments. The claims theories, if accepted, would overturn several decades of statutory law, administrative practice, and landholder expectations. The claims theories (contrary to innuendoes in the Petition for Certiorari) do not involve the issues of fraud and overreaching that were the subjects of hundreds of White Earth federal lawsuits and federal court settlements in the early 1900's.

3. The claims are of uncertain and even tenuous legal validity. They are not, as petitioners continually imply, tantamount to an undisputed legal right to the property itself. The

claims have not been successfully litigated in any federal courts and are subject to strong legal defenses.[1] Individual White Earth land claims brought in 1986 and 1988, prior to the running of the WELSA statute of limitations, have been dismissed in U.S. District Court.[2] The U.S. Department of Justice did not deem the theories to be of enough merit to initiate any litigation based on them. The questionableness of the claims theories also was discussed often during congressional consideration of WELSA, and even the Associate Solicitor for the U.S. Department of the Interior testified that some of the claims theories probably have little merit.[3] Only in one very narrowly limited state court case has even one of the land claims theories found support.[4]

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[1] *See, e.g., United States v. Mottaz*, 476 U.S. 834 (1986); *Bordeaux v. Hunt*, 621 F. Supp. 637 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 147 (1987); *Nichols v. Rysavy*, 610 F. Supp. 1245 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 147 (1987).

[2] *Manypenny v. United States*, Civ. No. 4-86-770, slip op. (D. Minn. Feb. 16, 1988); *Fineday v. United States*, Civ. No. 6-88-18, slip op. (D. Minn. Jan. 10, 1989).

[3] White Earth Indian Land Settlement Hearing on S.1396 Before the Select Committee on Indian Affairs United States Senate, 99th Cong. 1st Sess. 223-25 (1985) (Statement of Tim Vollman).

[4] The one case is *Minnesota v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), *cert. denied*, 436 U.S. 917 (1978). This ruling, which encouraged development of many of the claims theories, was based on a unique set of stipulated facts and was decided on narrow grounds. The court emphatically stated at the conclusion of its ruling (259 N.W.2d at 589) that:

> We reach this result based solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting such as, but not limited to, a situation where title to former trust patent property has already been quieted.

Later federal cases have criticized the reasoning of *Zay Zah*. "Bluntly put, *Zay Zah* is clearly wrong." *Bordeaux v. Hunt*, 621 F. Supp. 637, 649 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 147 (1987).

4. The claims and resulting title clouds have caused severe tensions and social and economic problems on the reservation. All parties have acknowledged this, and the disruptions on the reservation caused by this land controversy were testified to at length before Congress.

5. Without congressional action, the title problems probably would never go away, or would go away only after extremely long, complex, expensive, bitter, and divisive litigation. Furthermore, it is unlikely that litigation even could be brought on most of the claims, given the expense of litigation, fractionalized interests of individual heirs, uncertainty of results, and the fact that no one knows who many of the heirs of original allottees are. Hence, without congressional action, there would likely be no end to this controversy and its social and economic repercussions.

These are the essential facts that confronted Congress and that were recognized by the courts below. They all have ample basis in testimony and information available to Congress.

In response to this situation Congress passed the White Earth Reservation Land Settlement Act of 1985. The purpose of WELSA is to resolve land ownership uncertainties as equitably as possible, by ratifying past transactions that are now being questioned, and by providing compensation to all allottees and heirs who might argue that they were affected by such ratification. The past transactions which form the basis of the claims theories are identified by category. The Department of the Interior is ordered to identify and track down all allottees and heirs who might have been affected by those past transactions, and thus who might be entitled to compensation under WELSA. The Department of Interior is then ordered to provide such allottees and heirs with compensation based on a formula of the value of the land at the time of the disputed

transaction plus interest at five per centum compounded annually from the time of the transaction. The State of Minnesota is required to contribute money to the United States to assist in WELSA's implementation, and to give 10,000 acres of land to the White Earth Band as part of settlement. In addition to giving compensation to individual allottees and heirs, the United States is obligated to (and subsequently did) appropriate $6.6 million to the White Earth Band of Chippewa Indians for purposes of economic development. Lawsuits relating to the identified categories of land transactions are barred after passage of a certain length of time after enactment and the fulfillment of certain conditions. (The time period turned out to be approximately two years.) This approach is similar to the approach used by Congress in other recent Indian land claim settlement bills as discussed *infra*.

The issue raised by the petitioners' lawsuit and subsequent appeals is whether Congress violated any applicable constitutional provisions when it fashioned this settlement.

REASONS FOR DENYING THE WRIT

I. WELSA IS FULLY CONSISTENT WITH PRIOR CONGRESSIONAL LAND CLAIMS SETTLEMENT STATUTES.

WELSA follows closely in form and substance other congressional settlements of complex Indian land claims matters. Its purpose is to settle unresolved legal issues. Its findings and land title clearing mechanisms are virtually identical to those found in, for example, the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735; the Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. §§ 1751-1760; the

Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716; and the Florida Indian Land Claims Settlement Act, 25 U.S.C. §§ 1741-1749. To the extent that WELSA differs in some details from these acts, WELSA is more generous in its statute of limitations period and compensation provisions. Thus, far from being an aberration, WELSA's provisions follow a consistent pattern of exercises of congressional judgment in land claims matters.

II. WELSA IS CONSISTENT WITH JUDICIAL RECOMMENDATIONS WITH REGARD TO COMPLEX INDIAN LAND CLAIMS MATTERS.

Judges who have ruled in land claims cases (often *against* Indian plaintiffs) have urged Congress to resolve these matters—as Congress did by enacting WELSA. Chief Judge Bogue of the United States District Court for the District of South Dakota best summarized this attitude when he wrote in an opinion rejecting Indian plaintiffs' claims:

> Although this case does not fit the criteria so as to be classified as a political question, the forced fee patent claims cry out for a legislative solution, and not a judicial solution.

Nichols v. Rysavy, 610 F. Supp. 1245, 1254 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 147 (1987). Similar comments were made by judges hearing Indian land claims issues in the cases of *Bordeaux v. Hunt*, 621 F. Supp. 637, 658 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 147 (1987); *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 531 (N.D.N.Y. 1977), *aff'd*, 719

F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part,* 470 U.S. 226 (1985); and *Covelo Indian Community v. Watt,* 551 F. Supp. 366, 382 (D. D.C. 1982).

Again, far from departing radically from established principles, WELSA does precisely what judges have asked Congress to do in difficult land claims controversies.

III. THIS CASE INVOLVES NO CONFLICTS AMONG COURTS.

The court of appeals decision upholding WELSA is not in direct conflict with any other appellate court decision, and petitioners have not even alleged such. No courts have overturned major congressional land settlement legislation. No courts have ruled that congressional resolution of extremely uncertain causes of action is unconstitutional. In fact, as discussed earlier, WELSA does exactly what the judiciary has asked Congress to do in these situations.

IV. THE WHITE EARTH LAND ISSUE IS NOT OF NATIONAL SIGNIFICANCE.

The White Earth land claims and WELSA, though certainly of vital importance to Minnesota and its citizens (both Indian and non-Indian), are not of national significance. The land involved in WELSA is just within Minnesota. Furthermore, the White Earth Reservation has a unique history and a unique set of laws and statutes applying to it. Consideration by the Supreme Court of this case will not provide meaningful national precedent of any substantial future use.

V. THE HOLDINGS OF THE COURTS BELOW WERE CORRECT, REASONABLE, AND SUPPORTABLE ON SEVERAL GROUNDS.

A. Petitioners Could Not Overcome the Strong Presumption of Constitutionality of a Congressional Act.

As the courts below noted, there is a strong presumption that acts passed by Congress are constitutional. This is particularly true where Congress specifically analyzes (as it did with WELSA) the constitutional implications of its actions. These presumptions permeate Supreme Court precedent. *See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305 (1985); *Rostker v. Goldberg,* 453 U.S. 57 (1981); *Marquette Nat'l Bank v. First Omaha Service Corp.,* 439 U.S. 299 (1978). The presumption should become even stronger when Congress is exercising its constitutional authority over Indian affairs. *See, e.g., Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1977); *Lone Wolf v. Hitchcock,* 187 U.S. 533 (1903). None of petitioners' arguments and attempts at distinguishing applicable precedent come close to overcoming these basic presumptions.

B. The WELSA Valuation of Marginal Legal Claims Comports Fully With Just Compensation Requirements.

Throughout the litigation of this case, petitioners refused to acknowledge that WELSA is a reasonable and good faith effort to resolve highly uncertain and even legally tenuous potential claims to land. Ample testimony, analysis, and even

court decisions led Congress to this well supported conclusion. What WELSA "took" was not irrefutable rights to property, but highly speculative causes of action. Given that fact, WELSA's compensation formula[5] is rational and, compared with other Indian settlement acts, even generous. In the only evidence presented to the courts below on the results of WELSA's compensation formula, the figures show that the formula in sample cases can and does yield compensation to heirs that exceeds the entire value of the land at today's prices. Petitioners' consistent statements to the contrary have no basis in the record of this case. There is no constitutional reason to overturn Congress' analysis of the value of the heirs' speculative causes of action. Furthermore, in line with this Court's conclusion in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), it is doubtful that any "taking" at all took place here because Congress made a good faith effort to give Indians full value for the uncertain nature of their claims, thereby transmuting uncertain property claims to money. *See also Fort Berthhold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968).

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[5] Section 8(a) of WELSA (A52) provides that compensation is the value of the land at the time of the disputed transaction, minus any moneys actually received by the allottee or heir, plus 5% interest *compounded* annually. The compounding of interest far exceeds the standard simple interest rule used in Claims Court awards and provides substantial added value since many of the disputed transactions occurred 50 or more years ago. Additionally, compensation does not depend on congressional appropriations but automatically becomes a debt of the United States.

C. The Availability of a Reasonable Statute of Limitations Period Within Which to Bring Lawsuits Makes Compensation Under the Fifth Amendment Unnecessary in Any Event.

The need to achieve finality to disputed land claims is axiomatic with any land claims settlement statute. Accordingly, WELSA contains a statute of limitations on bringing lawsuits related to land claims. This Court has long held (and the parties here do not dispute) that if there is a reasonable period of time within which lawsuits can be brought after passage of the statute, then there is no constitutional "taking" problem. *United States v. Locke*, 471 U.S. 84 (1985); *Wilson v. Iseminger*, 185 U.S. 55 (1902); *Terry v. Anderson*, 95 U.S. 628 (1877). WELSA's limitations period was approximately two years. As the district court below analyzed in detail and found (A25-31), such a period is fully in accord with precedent and is reasonable within the context of the potential White Earth causes of action. *See, e.g., DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983); *Turner v. New York*, 168 U.S. 90 (1897); *Terry v. Anderson*, 95 U.S. 628 (1877). The existence of an appropriate statute of limitations period in WELSA thus makes it unnecessary constitutionally to provide *any* compensation for causes of action that are cut off, even though Congress chose to include a generous compensation scheme in WELSA anyway. Because WELSA would be constitutionally valid without *any* provisions for compensation, petitioners' attacks on the WELSA compensation provisions are meritless.

D. The WELSA Compensation is a Constitutional "Alternative Remedy" to Land Claims Litigation.

The combination of the WELSA statute of limitations period, compensation formula, and appeals provisions also can be upheld because they provide appropriate alternative forms of relief to potential plaintiffs. The applicable principle was stated by this Court's holding in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 (1978):

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

(Footnote omitted.) Similarly here, the WELSA system of litigation rights, compensation, and appeals provides a "reasonably just substitute" for the speculative causes of action that are eliminated. The constitutionality of WELSA also can be upheld on this ground, notwithstanding petitioners' just compensation clause arguments. *See also Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933).

E. The Tucker Act Remedy Satisfies All Relevant Constitutional Requirements.

Notwithstanding all the other grounds on which WELSA can be upheld, the opportunity for a plaintiff to obtain a judicial determination about the fairness of compensation via the Tucker Act, 28 U.S.C. § 1491, provides additional con-

stitutional protection for the provisions of WELSA.[6] Petitioners throughout the litigation tried to argue that the Tucker Act issue should be the focus of judicial inquiry, while ignoring the fact that, given the other constitutional protections inherent in WELSA, consideration of the Tucker Act remedy is not even necessary for constitutional analysis. Nonetheless, Congress added a Tucker Act remedy to the other provisions of WELSA, and this addition provides even further constitutional protection for the settlement.

The petitioners' Tucker Act arguments were dealt with in a straightforward manner by both courts below (A12-14; A38-44), and petitioners have pointed out no monumental errors in the courts' analyses or direct conflicts with other courts' decisions. In short, WELSA specifically allows an opportunity for judicial review of the fairness of any compensation determination. This opportunity may be taken under the Tucker Act, and offers a claimant a chance to present, in a judicial forum, all his compensation arguments. The opportunity for judicial review is all that the Constitution requires.

The analysis of the Tucker Act by the lower courts in this case is consistent with the Supreme Court's holdings in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Petitioners have failed to articulate any practical distinction between the current situation and the situations in those cases, and have failed to cite any authority to justify their proposed legal conclusions. Furthermore, petitioners' rhetoric

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[6] Section 6(d) of WELSA (A51-52) specifically allows the use of the Tucker Act to challenge the constitutional adequacy of the compensation as it applies to a plaintiff's allotment. A plaintiff presumably would have to demonstrate that an actual property interest had been taken from him and that the WELSA-determined compensation was less than due process would require.

about the "delusory" nature of the Tucker Act remedy founders against the rock of reality. As the district court concluded (A41-43) and the court of appeals confirmed (A12-14), WELSA's procedure probably would benefit petitioners more than the traditional Tucker Act procedure by providing more time for presenting a Tucker Act case and a better record to go along with it.

In sum, the Tucker Act issue need never be reached since WELSA can be upheld on any one of a number of other grounds. However, if it is reached, the lower courts' analyses of the Tucker Act and its operation in this case are correct and fully consistent with this Court's precedent. The availability of the Tucker Act remedy preserves the constitutionality of the settlement statute.

F. WELSA's Compensation Meets Constitutional Due Process Standards.

Regardless of the reasons (discussed *supra*) that "just compensation" analysis is not relevant to WELSA, the settlement act's constitutionality is preserved because it meets just compensation standards. WELSA gives compensation based on the fair market value of the land when it actually left Indian hands, and provides *compound* interest thereafter—not the simple interest which normally would apply in taking cases. The petitioners' only complaint with the compensation formula is that fair market value must be determined as of the time of passage of WELSA, and that any other scheme is facially unconstitutional. Petitioners ignore the fact that WELSA's compensation will often yield more than their preferred standard of current value, which makes their argument about facial unconstitutionality initially suspect. How-

ever, beyond that, petitioners fail to recognize the retroactive nature of WELSA. WELSA retroactively ratified past White Earth transactions *effective as of the date of said transfer.* This is fully consistent with what Congress did in other land claims settlement statutes, and is within Congress' power to accomplish. *See Mattingly v. District of Columbia,* 97 U.S. 1098 (1878); *McElroy v. Pegg,* 167 F.2d 668 (10th Cir.), *cert. denied,* 335 U.S. 817 (1948); *Goddard v. Frazier,* 156 F.2d 938 (10th Cir.), *cert. denied,* 329 U.S. 765 (1946); *United States v. Atlantic Richfield Co.,* 435 F. Supp. 1009 (D. Alaska 1977), *aff'd,* 612 F.2d 1132 (9th Cir. 1980). Since past transactions were ratified as of the date of the transfer, it is appropriate, reasonable, and logical to deem the date of taking to have been as of that time—especially since it is undisputed that the land left Indian hands then. The courts below so decided. Should an individual heir wish to argue this point in an appropriate case, there is an opportunity for such heir to obtain judicial review.

CONCLUSION

Granting certiorari in this case would serve no useful purpose. The decisions below were proper, well reasoned, and well within constitutional precedent. They do not conflict directly with decisions of the Supreme Court or other courts. They involve a controversy that is limited to Minnesota and the peculiar facts and legal history surrounding one reservation. They properly recognize the role Congress must play in Indian land claims controversies.

For all of the reasons cited herein, Minnesota urges the Court to deny certiorari in this matter.

Dated: October, 1989.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Assistant Attorney General
WILLIAM A. SZOTKOWSKI
Special Assistant
Attorney General
Suite 200, 520 Lafayette Road
St. Paul, Minnesota 55155
Telephone: (612) 296-0693
Attorneys for
State of Minnesota

No. 89 538

In the

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

Edna Emerson Littlewolf, et al.,

Petitioners,

-v.-

Manuel Lujan, Jr.,
Secretary of the Interior, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Respondents Becker, Clearwater and Mahnomen Counties

CHARLES K. DAYTON *
NANCY WILTGEN REIBERT
Leonard, Street and Deinard
Suite 2300
150 South Fifth Street
Minneapolis, MN 55402
Telephone (612) 335-1500

*Counsel of Record for Respondents Becker, Clearwater and Mahnomen Counties

Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Respondents Becker, Clearwater and Mahnomen Counties in the State of Minnesota oppose the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered on June 30, 1989.

Questions Presented for Review

1) Whether the compensation provision of the White Earth Reservation Land Settlement Act of 1985 (land value plus compounded interest) is reasonable and represents a good faith effort to compensate fairly under the Just Compensation Clause. The Court of Appeals for the District of Columbia Circuit correctly held in the affirmative.

2) Whether the remedy provided in the White Earth Reservation Land Settlement Act for filing a Tucker Act claim meets Due Process standards. The Court of Appeals for the District of Columbia Circuit properly held in the affirmative.

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STATEMENT OF THE CASE

Nature of the Action

Petitioners would have this Court declare unconstitutional the White Earth Reservation Land Settlement Act of 1985, 25 U.S.C. § 331 (note) ("WELSA" or "the Act"), legislation which was carefully crafted by Congress in response to a serious and extensive land claims controversy adversely affecting hundreds of individuals, both Indian and non-Indian, by creating social, economic and political hardships in the White Earth region in the State of Minnesota. Both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit held that the Act meets constitutional requirements. Littlewolf v. Lujan, 877 F.2d 1058 (D.C.

Cir. 1989); Littlewolf v. Hodel, 681 F. Supp. 929 (D.D.C. 1988).

Petitioners now seek review of the Court of Appeals' holding that the compensation provision of WELSA is reasonable, and that the Tucker Act remedy set forth in WELSA meets due process standards. However, neither of these holdings is one which is in conflict with the decisions of another federal court of appeals, neither involves an important and unsettled question of federal law, and neither is in conflict with decisions of this Court. Therefore, the petition for a writ of certiorari should be denied.

WELSA was enacted by Congress to settle unresolved and legally uncertain claims to lands within the original boundaries of the White Earth Reservation in the State of Minnesota. The land

controversy that WELSA was enacted to resolve remains (pending this litigation) a situation that cries out for a final solution by means of the well-reasoned and comprehensive compromise Congress has adopted. Without this legislation, the only resolution is litigation which would likely be unsatisfactory to the petitioners and costly to all concerned.

In light of the historical background and specific developments at White Earth Reservation in Minnesota, Congress acted rationally when it enacted WELSA. Congress had before it sufficient facts and opinions relative to White Earth, past and present, to conclude that the Act was necessary, consistent with its trust responsibilities, and a

reasonable response to a complicated situation.[1]

Historical Background

The White Earth Reservation in Minnesota was formally set apart for the Chippewas of the Mississippi by Executive Order of President Hayes on March 18, 1879, under authorization of the Treaty of March 19, 1867 between the United States and the Chippewa Indians. Beginning in the 1890s, each individual tribal member was issued a trust patent for 80 acres of land within the

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[1] See generally, Unresolved Claims on the White Earth Indian Reservation: Hearing on S.885 Before the Select Committee on Indian Affairs of the United States Senate, Sen. Hearing 936, 98th Cong., 1st Sess. (1983); White Earth Indian Land Claims Settlement: Hearings on S. 1396 Before the Select Committee on Indian Affairs of the United States Senate, Sen. Hearing 261, 99th Cong., 1st Sess. (1985); Sen. Rep. No. 192, 99th Cong., 1st Sess. (1985).

Reservation, in accordance with the General Allotment Act of 1887, which stated that the lands would be held in trust by the United States for a period of twenty-five (25) years free from any encumbrance, taxation and alienation without the approval of the Secretary of the Interior ("the Secretary"). The Steenerson Act of 1904 increased the size of each allotment on the White Earth Reservation from 80 acres to 160 acres.

The Clapp Amendment of 1906, 34 Stat. 353, as amended by the Act of March 1, 1907, 34 Stat. 1015, 1034, changed the nature of the allotment process at White Earth by removing "all restrictions as to sale, incumbrance, [sic] or taxation for allotments within the White Earth Reservation in the State of Minnesota ... held by adult mixed-blood Indians...."

While some of the conveyances by allottees following the enactment of the Clapp Amendment involved improper and fraudulent activity (which led to investigations by the Department of Justice and over 2,000 suits filed as a result),[2] the majority were made pursuant to the terms of the Clapp Amendment as it was interpreted and applied by federal officials.

Throughout this century, county and state governments and individual landowners relied on various Congressional acts and/or representations made by federal officials in matters relating to the sale, taxation and inheritance of allotments on White Earth. The Counties' reliance on these federal

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[2] Sen. Rep. No. 192 at 7-8.

policies was quite reasonable in light of the clear language of the Clapp Amendment. They commenced tax forfeiture proceedings[3] or recorded sales and mortgages of allotments held by adult mixed-blood Indians with federal approval, whether explicit or implied. Lands were bought and sold by innocent good faith purchasers consistent with the existing federal policies. These individuals had no legal reason to question title to the real property that was the subject of these transactions. The conveyances of White Earth land presented few problems until 1977.

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[3] After the Eighth Circuit held in Morrow v. United States, 243 F. 854 (8th Cir. 1917), that the trust patents were immune from taxation for twenty-five years, the counties cancelled tax forfeiture proceedings then pending or completed and, consistent with Morrow, did not commence taxation of allotments held by adult mixed-bloods until the 25 year trust period had expired.

Recent Developments at White Earth

In 1977, the Minnesota Supreme Court decided State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978). Limiting its decision to the particular facts of the case, the Court held that the land of the original allottee, Zay Zah, was not subject to taxation by the state because the Clapp Amendment had not divested the trust relationship between the United States and Zay Zah, nor had Zay Zah consented to end the trust. The Court's reasoning was strongly and necessarily influenced by a stipulation between the parties that the land in question, which had been issued to Zay Zah after passage of the Clapp Amendment, was not subject to taxation for a period of 25 years. The Court stated that it reached "this result based

solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting." Id. at 589 (emphasis added).

Nonetheless, the Solicitor of the Department of the Interior ("DOI") adopted a vastly expansive reading of that case and determined that the Zay Zah decision invalidated title to any White Earth parcel that ceased to be owned by an Indian allottee in certain specified circumstances, including conveyances occurring as part of a state court probate, conveyances by mixed-blood females between the ages of 18 and 21, and transactions involving loss of an allotment through tax forfeiture. A 1979 memorandum of the Solicitor reversed sixty years of Department policy concerning probate of the estates of

mixed-blood allottees in state court and purported to invalidate all such probates. Similarly, the Solicitor reversed sixty years of settled law and practice which had held that the age of majority of mixed-blood females on the White Earth Reservation was consistent with state law (age 18 when the lands in question were transferred in the early 1900s) and reasoned (incorrectly) that transfers of land by such persons who were less than age 21 were invalid.

Based on these conclusions, beginning in 1979, the Solicitor's Office sent a remarkable set of letters to the past and current owners of over 110,000 acres of land whose title history showed one of those types of transactions. Each letter cited Zay Zah and stated that possible defects existed in the title to

a particular parcel or parcels of land. The Department advised the recipients of these letters that the Justice Department was being requested to bring legal actions to set aside title and to seek damages for trespass based upon such defects. In fact, not one such suit was initiated by the Justice Department.

The foreseeable and instant result of the letters threatening lawsuits was clouded titles to these lands. Not surprisingly, landowners and former owners were horrified at the prospect of the federal government suing to remove title or for damages. Quite naturally, no attorney could give an opinion that title to such land was free from defects. Sales, mortgages, and financing involving such lands were plunged into immediate chaos.

In Mahnomen County alone, approximately 45,000 acres, encompassing in excess of 350 separate households, are directly affected by this extremely serious problem which is causing continued hardships for county residents. Financial institutions refuse to lend money to either prospective buyers or to current owners who wish to expand or merely continue their current operations. These various banks and savings and loan associations will not even consider a loan application involving property on the White Earth Reservation unless it is accompanied by a title opinion stating that title to the land is not clouded by any of the potential "claims," or the loan can be secured by property other than the real estate. The significant

economic hardships already suffered by many landowners will never be remedied.

The land claims controversy has also been a significant contributing factor to poor local economic conditions and a major stumbling block to any economic resurgence in the three counties. For example, the record shows that valuations of land for tax purposes are unrealistically low as a direct result of the clouded titles, with the result that the counties' primary source of revenue is significantly reduced and an increasingly small number of taxpayers is funding basic services for all residents of the particular county, including tribal members.

Those persons who currently own lands with clouded title within the original exterior boundaries of the White

Earth Reservation have suffered extensive financial and personal harm as a result of the land claims controversy which WELSA was enacted to resolve. If petitioners are successful, these landowners will be open to continued potential litigation over title to their lands, litigation which will be costly, time-consuming and complicated for both the landowners and members of the petitioning class. The title problems which exist within the counties at the present time will exist indefinitely unless the settlement legislation takes effect.

The chaos, controversy and clouded titles created by the 1979 letters from the Solicitor, which led to enactment of WELSA, will continue if the parties are forced into court to litigate what may be

hundreds or even thousands of individual claims. Absent legislation, at a minimum hundreds of quiet title actions would be required at potentially great expense to innocent, good faith purchasers of these lands and to Indian allottees or heirs who may seek to have the title question resolved in their favor. Congress recognized that without this legislation, there is no alternative to litigation.

The legislative record demonstrates that Congress considered the many conflicting interests and problems involved: the potential claims of Indian heirs, the hardship and uncertainty created for landowners by the DOI's 1979 letters, the time and expense of litigating every claim, and the possible profound negative impact of continued conflict on the social well-being of all

reservation inhabitants, Indian or not. Congress crafted legislation in order to: 1) ensure that those allottees or their heirs with any claims, whether potentially meritorious or not, of the types raised by the DOI in its 1979 letters to landowners, would receive compensation without the necessity of expensive (and potentially fruitless) litigation, 2) provide the opportunity to litigate claims for those who would choose a judicial rather than legislative resolution, 3) settle the unresolved legal uncertainties relating to these claims arising from past federal laws and policies, and 4) provide the White Earth Band as a whole with economic assistance. The Act is a reasonable response to these various and complex problems.

REASONS FOR DENYING THE PETITION

1. Congress Has Broad Constitutional Power to Legislate Over Indian Affairs.

Federal power over Indian affairs has been interpreted broadly by the courts, primarily based on the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, and the Property Clause, U.S. Const. art. IV, § 3, cl. 2, of the United States Constitution. However, for most purposes it is sufficient to conclude that there is a single federal power over Indian affairs that is essentially an amalgam of specific constitutional clauses. See, e.g., United States v. Antelope, 430 U.S. 641 (1977).

While actions of Congress dealing with Indians are reviewable to determine

whether they are purely arbitrary, Congress has wide discretion in determining what is reasonably essential to the protection of Indians and its action "must be accepted and given full effect by the courts." Perrin v. United States, 232 U.S. 478, 486 (1914). Congress has transferred tribal lands to individual Indians without compensation to the tribe, terminated the trust status of tribal lands, determined which members of a particular tribe were entitled to share in the property and compensated tribes or individual Indians when "vested" property rights were taken away. See, United States v. Seminole Nation, 299 U.S. 417, 428-429 (1937); Sizemore v. Brady, 235 U.S. 441, 450 (1914); Choate v. Trapp, 224 U.S. 665 (1912). The enactment of WELSA was not an abuse of

Congressional discretion and must be given full effect.

2. WELSA is Tied Rationally to the Fulfillment of Congress' Obligation Toward the Indians of White Earth.

The standard of review for a Congressional enactment dealing with Indian affairs is whether the legislation being challenged is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977), reh. denied, 431 U.S. 960 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)). Where treatment of Indians through the legislation can be related rationally to legitimate objectives, Congressional judgment that the enactment is in the best interests of the Indians must not be

disturbed. Morton v. Mancari, 417 U.S. at 555.

As the courts below held, Congress' objectives are legitimate and meet the "tied rationally" test. Littlewolf v. Lujan, 877 F.2d at 1064; Littlewolf v. Hodel, 681 F. Supp. at 939. Congress determined that it was in the best interests of the allottees or heirs who may have a potential claim for title to a parcel (or a fractional share of a parcel) to settle these claims legislatively. Without legislation, each claim would have to be litigated separately, at a very high cost to the allottees and heirs. Furthermore, since the majority of these claims are of questionable legal merit (and are not "vested property rights"), litigation would be undertaken with no certainty

whatsoever that the outcome would be favorable to the individual Indians. WELSA provides compensation to the allottees and heirs regardless of the merits of the various claims. Clearly, WELSA was not an arbitrary act of Congress.

3. The Compensation Provided in WELSA is Not a Violation of the Due Process or Just Compensation Clauses.

Under the terms of WELSA, compensation is provided to any allottee or heir within the categories set forth in the Act, provided he or she did not bring a claim for title or damages prior to the running of the limitations period, regardless of whether she would have succeeded on the merits of her claim. Compensation is based on the fair market value of the land at the time it was

transferred (less any compensation actually received) plus five percent interest compounded annually up to the date of enactment and at the general interest rate thereafter.

Petitioners assert (without any supporting authority) that a "taking" occurs at that point in time when WELSA bars the right to commence lawsuits based on questionable and legally uncertain claims to title and/or for damages. Petitioners further argue that "the Act bars all actions to recover title," a statement that is simply false. As petitioners are well aware, potential claimants had over twenty-three months after WELSA was enacted to bring suit for title. Indeed, if one assumes for purposes of argument that the claims are "vested" property rights, as petitioners

assert, then the claims vested not with WELSA's enactment but rather when the lands were first transferred; therefore, these potential litigants have had forty to sixty years to bring their actions[4].

If there was a "taking," it occurred when the past transactions described in the Act removed the property from Indian ownership, and not at the time WELSA became effective. Antoine v. United States, 710 F.2d 477, 479 (8th Cir. 1983). The only logical time at which the "loss" can be viewed is the time the

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[4] Petitioners would have the Court believe that the "claims" to title are virtually certain of succeeding if litigated. The contrary has proven true thus far. Claims have been brought by approximately 40 allottees and heirs in Manypenny, et al. v. United States, et al., Civ. No. 4-86-770 (D. Minn.) and Fineday, et al. v. United States, et al., Civ. No. 6-88-18 (D. Minn). In each case, all claims against the United States, State of Minnesota, Becker, Clearwater and Mahnomen Counties, and numerous individual defendants have been dismissed.

allotment materially left Indian ownership. Id. If what is "taken" is a cause of action, as petitioners claim, common sense dictates that one looks to the time when the cause of action accrued, i.e., when the transfer took place, to calculate its value. Some of the lands involved have been held by non-Indians for over 70 years. To value the "taking" of land now is to give an heir or allottee the benefit of all improvements and enhancement of value contributed by third parties. There is no constitutional requirement for such a windfall.

Even if the claims were irrefutable, or could be considered vested property rights, the compensation is just pursuant to constitutional standards. This Court held in United States v. Creek Nation,

295 U.S. 103, 111 (1934), that compensation should be based on the value of the land at the time ownership changed. In addition, interest at a reasonable rate is appropriate in order "to produce the present full equivalent of that value...." Id. This Court reaffirmed that standard in United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123 (1938). The decision of the court of appeals, affirming the district court's holding that WELSA compensates fairly under the Just Compensation clause, is consistent with the prior rulings of this Court. Indeed, the compensation scheme exceeds constitutional requirements, and in fact, provides a handsome windfall to many heirs who are being compensated for claims which are not supportable and

would likely never be brought, a benefit which will be lost if petitioners are successful in invalidating the Act.

Furthermore, the Tucker Act remedy set out in Section 6(d) of the Act meets constitutional requirements. See, Regional Rail Reorganization Act Cases, 419 U.S. 102, 150 (1974). This mechanism allows individuals to challenge the constitutional adequacy of the specific compensation paid for a particular allotment or interest in an allotment. Thus, any person who believes his/her "claim" has a greater "value" than that determined by DOI has the opportunity to receive a full review of the specific claim and will be awarded compensation based on the individual merits of that claim. As the district court pointed out, the six month period allowed by

WELSA for bringing a Tucker Act claim follows "a long period of time in which allottees could have discovered information about their land claims." Littlewolf v. Hodel, 681 F.Supp. at 948. Indeed, by the time compensation has been calculated by DOI, all of the relevant information pertaining to a particular allotment will have been gathered and examined. Presumably, that information will be available to the allottee or heir. If anything, appellants will be in a better position in terms of information at hand than a typical Tucker Act claimant.

CONCLUSION

For all of the reasons set forth herein, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

LEONARD, STREET AND DEINARD

Charles K. Dayton*
Nancy Wiltgen Reibert
Suite 2300
150 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 335-1500

*Counsel of Record for Respondents Becker, Clearwater and Mahnomen Counties

No. 89-538

In the Supreme Court of the United States

OCTOBER TERM, 1989

EDNA EMERSON LITTLEWOLF, ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
EDWARD J. PASSARELLI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the White Earth Reservation Land Settlement Act, 25 U.S.C. 331 note (Supp. V 1987), by limiting the time in which certain Indian land claims may be made against third parties, establishing statutory compensation for those claims in the alternative, and providing a Tucker Act remedy for claimants dissatisfied with the statutory compensation, on its face takes petitioners' property without just compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-538

EDNA EMERSON LITTLEWOLF, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 877 F.2d 1058. The opinion of the district court (Pet. App. A15-A46) is reported at 681 F. Supp. 929.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1989. The petition for a writ of certiorari was filed on September 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this action as a class seeking an injunction and order declaring the White Earth Reservation

Land Settlement Act of 1985 (WELSA), Pub. L. No. 99-264, 100 Stat. 61, unconstitutional. WELSA is intended to resolve fifty-year-old claims to former Indian allotments on the White Earth Reservation by imposing a statute of limitations on the filing of suits by Indian claimants for title or damages, retroactively ratifying past transfers of these allotments once the limitations period has expired, and providing for compensation of all eligible claimants who have elected not to file suit for title or damages.

1. Pursuant to the Treaty of March 19, 1867, 16 Stat. 719, the United States established the White Earth Reservation, consisting of approximately 830,000 acres in northwestern Minnesota, for the benefit of certain Chippewa Indians. In the late 1800's and during the first few years of this century, a large portion of the reservation land was allotted to individual Indians through restricted deeds of trust. Pet. App. A3. In 1906, however, Congress passed the Clapp Amendment (Act of June 21, 1906), ch. 3504, 34 Stat. 353, as amended by the Act of March 1, 1907, ch. 2285, 34 Stat. 1034, removing restrictions on allotments held by adult mixed-blood Indians, and authorizing the granting of fee simple title to adult mixed-blood and, in certain circumstances, to full-blood Indians. As a result, many of the allotments passed into non-Indian possession. Pet. App. A3-A4.

In 1979, the Secretary of the Interior, relying in part upon a decision of the Minnesota Supreme Court, *State* v. *Zay Zah*, 259 N.W.2d 580 (1977), cert. denied, 436 U.S. 917 (1978), which held that the Clapp Amendment could not unilaterally abrogate the trust status of a White Earth allotment, determined that the transactions which led to many of the alleged terminations of the allottees' interests had been made in violation of the trust deed restrictions and that the purported conveyances were, therefore, in-

effective. Pet. App. A5. The effect of *Zay Zah* and the Secretary's determination was to cloud title to more than 100,000 acres, resulting in "social and economic chaos." Pet. App. A5-A6.

2. In 1986, Congress acted to settle permanently the "unresolved legal uncertainties" concerning title to the allotted reservation lands by enacting WELSA. 25 U.S.C. 331 note (Section 2(6)) (Supp. V 1987). The Act limits the time in which Indian allottees and their heirs may bring claims: Section 6(c) provides that "any action in any court to recover title or damages" with respect to the alleged invalid conveyances "shall be forever barred" unless brought within 180 days of the date of the enactment of WELSA or prior to the Secretary's certificaton of certain described events, whichever occurs later.[1] The Secretary's certification occurred on March 21, 1988, approximately two years after WELSA's enactment, thus barring further suits against third parties. See Pet. App. A7.

In the alternative, the Act allows Indian allottees or their heirs to receive compensation for their claims from the United States, in an amount to be determined administratively. Section 8 of the Act, in conjunction with Section 7, directs the Secretary to investigate the White Earth allotments, ascertain which ones wrongfully passed from the allottees' possession, and then determine compensation based upon the fair market value as of the date of the alleged invalid transaction, plus interest. The respective

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[1] WELSA required the Secretary to certify, by publication in the Federal Register, that certain conditions required by Section 10 of WELSA had been fulfilled. Those conditions include the donation by the State of Minnesota of 10,000 acres of land to be held in trust for the Chippewa Indians, an appropriation by the State of $500,000 to assist in the settlement provided for in WELSA, and an appropriation by the United States of $6,600,000 for economic development to benefit the White Earth Band of the Chippewa Indians.

allottee or heirs then have 180 days following written notification of the Secretary's determination in which to seek judicial review of its sufficiency. 25 U.S.C. 331 note (Section 8(d)) (Supp. V 1987). The statutory compensation remedy available under Section 8 is not available to claimants who have timely filed Section 6(d) suits against third parties. 25 U.S.C. 331 note (Section 6(d)) (Supp. V 1987).

Finally, Section 6(d) provides that a claimant may challenge the constitutional adequacy of the statutory compensation that the Secretary determines to be due by filing suit under the Tucker Act, 28 U.S.C. 1491, within 180 days of receiving notice of the Secretary's determination.

In summary, then, the Act provides three different routes by which an allegedly wrongfully dispossessed allottee or heirs may obtain redress. First, each claimant had a period of approximately two years beyond the passage of the Act in which to bring actions against third parties. Second, a claimant is entitled to an administratively determined amount of compensation. Finally, the claimant may reject the administratively determined compensation and instead make a claim under the Tucker Act, within 180 days of the notification of the Secretary's determination.

3. Petitioners are a class of Indians whose claims to the land on the White Earth Reservation have been affected by WELSA.[2] The class brought suit on a number of grounds, including the claim that WELSA violates due process because it provided for an inadequate amount of time to file suit for title and damages. Pet. App. A24.

[2] Included among the named petitioners are many who filed separate suits in district court within the time allowed by WELSA to test title and seek damages. Those suits were found subject to substantial legal defenses resulting in dismissals. *Manypenny* v. *United States*, Civ. No. 4-86-770 (D. Minn. Feb. 16, 1988); *Fineday* v. *United States*, Civ. No. 6-88-18 (D. Minn. Jan. 10, 1989).

Petitioners further argued that WELSA effects a taking of property without just compensation, despite their entitlement to administratively determined compensation and the availability of a Tucker Act remedy. *Ibid.* Petitioners sought injunctive relief and, alternatively, a declaration that the Act is unconstitutional. Pet. App. A16.

4. The district court entered summary judgment on behalf of respondents. Pet. App. A16-A46. Examining Congress's action in light of the government's generalized trust responsibility towards Native Americans, the district court ruled that WELSA's limitations period for filing suit comports with due process requirements, noting that it was "rationally related to the government's legitimate interest in protecting thousands of Indian claimants from the need to litigate thousands of expensive, time-consuming individual actions to recover any compensation for their claims." Pet. App. A26. Hence, the court reasoned, the Act properly implements Congress's valid legislative goals of encouraging either prompt suit by Indian claimants or their receipt of a monetary settlement so as quickly to right the wrong done to the White Earth Band and to clear title to the large land area affected.[3] Pet. App. A26-A29.

The court further held that the imposition of a limitations period on the time to bring suit did not effect a "taking" of the claimants' right to sue because the Act afforded the claimants a reasonable opportunity to bring suit. Pet. App. A36. Nor did WELSA unconstitutionally take claimed interests in land, few of which had been "tested in court" (*ibid.*), because Congress expressly provided a

[3] The district court noted that petitioners had had, in fact, a half century in which to file suit. It explained that the Indians' trust relationship with the United States could excuse them from a defense of laches but did not exempt them from the imposition of a time constraint on their future ability to bring suit. Pet. App. A29-A30.

remedy for the claimants to recover just compensation for any takings. Pet. App. A37. The Act not only established a statutory compensation scheme designed in "good faith * * * to compensate plaintiffs fairly," but also explicitly confirmed the availability of a Tucker Act remedy to challenge the adequacy of the amount of compensation determined by the Secretary to be due. Pet. App. A37-A43.

The district court rejected petitioners' claim that the Act improperly limited the Tucker Act remedy. The court observed that the six-month limitations period on Tucker Act suits is triggered only when a claimant receives the Secretary's determination of the statutory amount of compensation he or she is due, on a date almost certainly more than six years (the normal period allowed for the filing of a Tucker Act suit) after any taking had occurred. Pet. App. A42. In any event, the court ruled, it could not fault Congress's judgment that the six-month limitations period is reasonable under the circumstances. *Ibid.*

5. The court of appeals affirmed. Pet. App. A1-A14. The court found it unnecessary to address the issue whether the time permitted by WELSA for bringing damages or recovery suits against third parties is so inadequate as to offend due process. Assuming that WELSA does effect a taking of rights to recover against third parties, the court of appeals found the statute constitutional nonetheless, because it provides adequate remedies for recovering just compensation. Pet. App. A11-A12. The court agreed with the district court's conclusion that the Act's provision for administrative compensation is a good faith effort to compensate petitioners fairly. Pet. App. A13. It further held that, in any event, the alternative Tucker Act remedy "ensures full compensation in those particular instances where the statutory payment might not adequately compensate claimants." *Ibid.* The court

determined in addition that "under the circumstances of this case," where Congress by enacting WELSA had alerted the White Earth Band members that the Secretary would be investigating claims and determining compensation over the next several years, and where the Secretary is to give notice to potential claimants when a compensation determination has been made, the six-month period for bringing Tucker Act suits is as meaningful as a six-year period without such notice would be. Pet. App. A13-A14.

ARGUMENT

The court of appeals correctly ruled that WELSA expressly ensures constitutionally adequate compensation in the unique factual circumstances presented by petitioners' uncertain claims for title and damages. The court's determination does not conflict with any decision of this Court or any court of appeals. And, because petitioners have a fully adequate remedy for recovering just compensation for any taking arising from the operation of the statute, this case raises no issue of general importance warranting review by this Court.

1. At the outset, petitioners would have this Court review an issue that the court of appeals properly decided not to resolve. Petitioners contend (Pet. 21-28) that the lower court was required to determine whether, in each instance, the administrative compensation provided by Section 8(a) of WELSA will be adequate to satisfy the nature of the property interest they contend was taken, irrespective of the Tucker Act remedy that is also expressly provided by WELSA.

However, determinations related to takings litigation are by nature fact specific. "The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005

(1984). Clearly, where a statute, as here, provides for administrative compensation for uncertain legal claims, constitutional sufficiency can be determined only after analyzing the factual and legal basis for each claim and comparing it with the compensation provided. As this Court has repeatedly held, it is inappropriate for a court to render hypothetical views on whether an uncompensated taking has occurred before the claimant has pursued administrative and other remedies that may render that holding unnecessary. See, *e.g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-197 (1985); *Ruckelshaus*, 467 U.S. at 1013 & n.16, 1019; *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 94 n.39 (1978).[4]

Further, even if it could be assumed that a given claimant might receive less in administrative compensation than the Constitution demands, it does not follow that WELSA

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[4] Thus, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974), the Court noted in particular that disputes about valuation theories require resolution on a developed factual record that includes evidence of actual figures. As the Court commented there, a record that provides the "confining circumstances of particular situations" can best inform constitutional adjudication. *Ibid.*

Here, the most petitioners can offer is a comparison between a Congressional Budget Office (CBO) estimate and the State of Minnesota's valuation of 10,000 acres to be transferred to the tribe to argue that evidence suggests that Congress intended less than adequate compensation. See Pet. 23-24. But first, the CBO estimate is only an estimate and funding is in no way limited by the estimate. Indeed, there was evidence in the record below that in some instances the compensation formula would yield more than the current value of the properties in question. Golden Affidavit, C.A. App. 726-728. Second, petitioners confuse the market value of their uncertain claims with the market value of the land. Third, petitioners assume, without substantiation, that the properties being transferred by the State of Minnesota are of equivalent value to the land lost by Indian allottees in the early part of the century.

is unconstitutional on its face. Rather, the claim that Section 8(a) is unconstitutional could be made only as applied to that factual situation. See *Members of the City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 797-798 (1984) ("a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner").

2. Even in that case, the claim would fail because WELSA makes available the "safety net" of a Tucker Act remedy. As the Court made clear in *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1019-1020 (1984), and in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 155-156 (1974), the availability of a Tucker Act remedy ensures that no less than the constitutionally required amount of compensation is available. The Tucker Act remedy thus guarantees that there will be no improper "taking," even where an alternative statutory compensation scheme may not suffice to provide just compensation.[5] See *Monsanto,* 467 U.S. at 1018-1019; *Regional Rail Reorganization Act Cases,* 419 U.S. at 155-156.

Here, the Act's express terms and legislative history make clear that Congress intended to provide adequate compensation for any taking that might occur by underscoring the availability of a Tucker Act remedy. Section 6(d) of WELSA provides:

> This section shall not bar an heir, allottee, or any other person entitled to compensation under this Act from maintaining an action * * * against the United States in the Claims Court pursuant to the Tucker Act, section 1491 of Title 28, United States Code * * *.

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[5] The takings clause of the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," the obligation to pay just compensation. *First English Evangelical Lutheran Church* v. *County of Los Angeles,* 482 U.S. 304, 314-315 (1987).

The legislative history of WELSA confirms that the Tucker Act remedy was included "to remove any risk that a court might hold it unconstitutional" (131 Cong. Rec. 36,248 (1985)):

> S. 1396 has addressed the taking issue by explicitly providing * * * a Tucker Act remedy to any person entitled to just compensation for the loss of his property.

Ibid.

Hence, claimants who are dissatisfied with the administratively determined compensation can sue the United States in the Claims Court for just compensation for any taking that may have occurred.[6]

3. Nor is there merit in petitioners' contention (Pet. 33-37) that WELSA impermissibly restricts the Tucker Act remedy. The specification of a time period in which claimants may use the Tucker Act remedy does not undermine the implied promise to pay for any taking that may result from WELSA. Rather, claimants simply must file their Tucker Act suit six months after an administrative determination of the compensation due them.

The district court, affirmed by the court of appeals, properly found this period to be a reasonable one. The district court recognized that because of the timing of the administrative determination, petitioners would, in fact, almost certainly have in excess of six years from the date of the alleged taking in which to file suit, which is more than plaintiffs normally have to file other Tucker Act complaints. Pet. App. A42. Moreover, as the court of appeals found, Congress by enacting WELSA alerted White

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[6] The fact that petitioners may prefer direct access to the Tucker Act remedy rather than resort first to the administrative remedy authorized by the Act does not mean that the Act effects an uncompensated taking or is otherwise unconstitutional.

Earth Band members that the Secretary would be determining the value of their claims over several years, and the Secretary is directed by the statute to notify claimants of that determination before the six-month time period for claims is triggered. In this context, the notice provided by the Secretary makes the six-month period as meaningful as a longer, six-year period without notice. Pet. App. A13. This is particularly true because the availability of a factual record generated by the administrative process is likely to enable a claimant to bring an action far more swiftly than a typical Tucker Act claimant. Pet. App. A42-A43. Accordingly, the courts below properly upheld the statutory period in which petitioners may file a Tucker Act claim as a reasonable one; that ruling does not warrant further review by this Court.

Nor does WELSA impermissibly burden the making of a Tucker Act claim by requiring forfeiture of administratively determined compensation when a Tucker Act claim is filed. See Pet. 34-35. The forfeiture provision prevents double recovery. Moreover, because those opting for Claims Court relief retain a full remedy for their taking claims, the amount forfeited is simply a congressionally provided gratuity.[7]

4. In any event, the administratively determined compensation authorized by the statute is fully adequate (indeed, more than adequate) for the uncertain causes of action at issue in this case. The claims against third parties that were extinguished if suit was not brought within 23 months after enactment of WELSA were "untested and of unknown legal value." 132 Cong. Rec. 4215 (1986). It was

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[7] Nor is the Tucker Act remedy burdened because petitioners are required to prove a taking claim as it applies to a "particular allotment or interest." 25 U.S.C. 331 note (Section 6(d)) (Supp. V 1987). This is the burden that any plaintiff with a taking claim would have.

recognized that they were not "proven entitlements" and that many of them rested on "questionable legal grounds." 131 Cong. Rec. 36,233 (1985).

Notwithstanding the speculative nature of the claims against third parties, Congress authorized compensation for all allottees and heirs dispossessed by the transactions described in Section 4(a) of WELSA. It provided for payment for the value of the lands when a claimant was dispossessed, with compound interest from the date the property left Indian possession, obviating any consideration of whether the transaction which led to the dispossession was, in fact, legally valid. No discounting is to be made for the litigative risk, expense, or the speculative nature of the causes of action for property or damages against third parties. In the past, compensatory damages for a lost allotment have been viewed as providing the full monetary equivalent, when an award rests on the land's value at the time it was lost with interest at a reasonable rate. See *United States* v. *Creek Nation,* 295 U.S. 103, 109-111 (1935). Here, the allottees or their heirs will receive compensation for the lost property, plus the loss of use value of the monetary equivalent in interest.[8]

In sum, given the complex and doubtful nature of the claims, Congress's judgment to provide for administratively determined compensation must—on its face—be deemed a valid effort to provide just compensation. See, *e.g., United States* v. *Sioux Nation,* 448 U.S. 371, 416-417

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[8] Claimants receive 5% compound interest. 25 U.S.C. 331 note (Section 8(a)) (Supp. V 1987). The same interest rate without compounding has been used in other Indian claims (see *United States* v. *Creek Nation*, 295 U.S. 103, 111-112 (1935)), and it is certainly a fair equivalent interest rate since the rates of interest even in the 1960's were often below 5%. See, *e.g., Pitcairn* v. *United States*, 547 F.2d 1106, 1120-1121 (Ct. Cl. 1976).

(1980). That effort is underscored by the availability of a Tucker Act remedy. The Constitution requires no more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
EDWARD J. PASSARELLI
Attorneys

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* The Solicitor General is disqualified in this case.

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